

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

UNITED STATES OF AMERICA, et al., )  
  )  
  Plaintiffs,      ) No. C70-9213  
  ) Subproceeding 01-1  
v.                                     )  
  )  
STATE OF WASHINGTON, et al.,        )  
  )  
  Defendants.     )  
  )

## **TRANSCRIPT OF PROCEEDINGS**

**BEFORE THE HONORABLE RICARDO S. MARTINEZ**

**October 13, 2009**

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1                   THE CLERK: This is the matter of the United States of  
2 America, et al, versus the State of Washington, Case  
3 No. C70-9213, sub-proceeding 01-1.

4                   Will counsel please make their appearances for the record?

5                   MR. SLEDD: Your Honor, John Sledd representing the  
6 Sauk-Suiattle, the Stillaguamish, the Nisqually, Squaxin Island,  
7 Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam,  
8 Lower Elwha Klallam and Hoh Tribes.

9                   THE COURT: Good morning, Mr. Sledd.

10                  MR. STAY: Good morning, your Honor. My name is Alan  
11 Stay. I represent just one tribe, the Muckleshoot Tribe.

12                  THE COURT: Mr. Stay.

13                  MS. FOSTER: Good morning, your Honor. Alix Foster for  
14 the Swinomish Indian Tribal Community.

15                  THE COURT: Ms. Foster.

16                  MR. WEAVER: Good morning, your Honor. Tim Weaver,  
17 co-counsel for the Yakima Nation.

18                  THE COURT: Mr. Weaver.

19                  MR. MORISSET: May it please the Court, Mason Morisset  
20 for the Tulalip Tribes.

21                  THE COURT: Mr. Morisset.

22                  MS. RASMUSSEN: May it please the Court, I'm Lauren  
23 Rasmussen, for the Port Gamble S'Klallam and the Jamestown  
24 S'Klallam.

25                  THE COURT: Thank you, Ms. Rasmussen.

1                   MR. HOLLOWED: Good morning, your Honor. May it please  
2 the court, my name is John Hollowed. I'm with the Northwest  
3 Indian Fisheries Commission.

4                   THE COURT: Mr. Hollowed, good morning.

5                   MR. MONSON: Good morning, your Honor. Peter Monson for  
6 the United States of America.

7                   THE COURT: Mr. Monson, thank you.

8                   MR. RAAS: Good morning, your Honor. Daniel Raas for  
9 the Lummi Nation.

10                  THE COURT: Good morning, Mr. Raas.

11                  MR. JOHNSEN: Harry Johnsen, co-counsel for the Lummi  
12 Nation.

13                  MR. STILTNER: Good morning, your Honor. Sam Stiltner  
14 for the Puyallup Tribe.

15                  THE COURT: Good morning.

16                  MR. CHESNIN: Good morning, your Honor. Harold Chesnin  
17 representing the Upper Skagit Indian Tribe.

18                  THE COURT: Mr. Chesnin.

19                  MR. GRUBER: Good morning, your Honor. Brian Gruber  
20 representing the Makah Tribe.

21                  THE COURT: Good morning.

22                  MR. DAVIES: Good morning, your Honor. Bruce Davies  
23 representing the Squaxin Island Tribe.

24                  THE COURT: Mr. Davies. Thank you.

25                  MS. SAGOLLA: Good morning, your Honor. Laura Sagolla

1 representing the tribes that Mr. Sledd has named.

2 THE COURT: Good morning.

3 MS. KRUEGER: Good morning, your Honor. Catherine  
4 Krueger, co-counsel for the Quileute Tribe.

5 THE COURT: Thank you.

6 MR. LEWIS: Good morning, your Honor. Yale Lewis, also  
7 co-counsel for Quileute.

8 THE COURT: Good morning as well.

9 MR. NIELSEN: Good morning, your Honor. Eric Nielsen  
10 for the Quinault Indian Nation.

11 THE COURT: Thank you.

12 MR. ZIELER: Good morning, your Honor. Tom Zieler,  
13 co-counsel for the Yakima Nation.

14 THE COURT: Good morning.

15 Does that take care of everybody on that side of the room?

16 MR. TOMISSER: Good morning, your Honor. Rene Tomisser  
17 with the State Office of the Attorney General, representing the  
18 State of Washington in this matter.

19 THE COURT: Good morning.

20 MS. WOODS: Your Honor, good morning. I'm Fronda Woods  
21 for the State of Washington.

22 THE COURT: Ms. Woods, thank you.

23 MR. SHAFTEL: Good morning, your Honor. Doug Shaftel  
24 for the State of Washington.

25 THE COURT: Mr. Shaftel.

1                   MR. FERESTER: Good morning, your Honor. I'm Phil  
2 Ferester, also for the State of Washington.

3                   THE COURT: Mr. Ferester.

4                   That takes care of everybody there. All right. At our  
5 pretrial conference -- just before we entered our pretrial  
6 conference, there was a request for a few minutes, as we started,  
7 to go ahead and do opening statements. The Court's quite aware  
8 of the background and what got us to this particular point, but  
9 you certainly have a right to make an opening.

10                  Mr. Sledd?

11                  MR. SLEDD: Your Honor, two years ago in August, this  
12 Court entered its summary judgment in this matter, declaring that  
13 state-owned culverts beneath state roads that impede the passage  
14 of salmon to and from the tribes' usual and accustomed fishing  
15 areas and diminish the number of fish available for tribal  
16 harvest are in violation of the State's duties under the treaty.

17                  The sole question to be resolved at this trial is whether, in  
18 light of that summary judgment decision, anything must be done  
19 differently in the state of Washington's culvert program.

20                  If the plaintiffs were allowed to present but one piece of  
21 evidence in this case, your Honor, I would offer up a document  
22 prepared by the State. It's called the "Fish Passage Program  
23 Progress Performance Report for 2009," which will be offered into  
24 evidence along with a number of similar reports prepared in prior  
25 years. And I would direct your Honor's attention to Tables 4 and

1       5 in that report and the text accompanying it which indicates  
2       that the State of Washington, the Department of Transportation,  
3       owns over 2,000 barrier culverts statewide.

4           The Department of Transportation, which owns more barrier  
5       culverts than any other state agency, in the year immediately  
6       following your summary judgment decision fixed the least number  
7       of its barrier culverts that it has fixed in any year since 2000.  
8       That evidence, your Honor, together with the fact that in that  
9       same year, 2008, the Department of Transportation, which has a  
10      dedicated funding source and program for the correction of  
11      culverts, fixed with that funding source the least culverts it  
12      has fixed since 1991, precisely zero, demonstrate that the  
13      plaintiffs are entitled to an injunction to compel the State to  
14      do a better job to fix the culverts more properly, more  
15      correctly, and to make it last.

16           The Court, I'm sure, is familiar with the four-part test for  
17      grant of an injunction. The plaintiffs intend to focus their  
18      evidence on the latter two parts of that test, the balance of  
19      harms and the public interest.

20           With regard to the harm to the plaintiffs, your Honor,  
21      perhaps the easiest thing would be just to look at numbers. The  
22      admitted facts indicate that there are nearly 2,000 fish barriers  
23      just in the case area between the four state agencies that will  
24      be in front of you. A minimum of 1,100 of those are blocking  
25      salmon passage. Three-quarters of those are owned by the

1       Department of Transportation. Statewide, those DOT culverts  
2       alone block 3,500 miles of salmon habitat, according to the  
3       agreed facts.

4           And those are only numbers, though, your Honor. To really  
5       understand the harm that the state's treaty violation has  
6       inflicted on the plaintiff tribes, it is necessary to try to  
7       understand the relationship between the tribes and their members  
8       and the salmon. The only way I think that we as nonIndians can  
9       do that is to talk with the tribal members themselves. And  
10      that's the reason why the first two witnesses the Court will hear  
11      from today are members of the tribes: Loraine Loomis from the  
12      Swinomish Tribe and Charlene Krise from the Squaxin Island Tribe.

13           Ms. Loomis is a fisheries manager. Ms. Krise is the museum  
14      manager. Both have fished commercially and for subsistence.  
15      Both have grown up in the community and will testify about the  
16      deep roles that the salmon and salmon fishing played holding  
17      those communities together and the deep harm that they suffer  
18      when their harvests are depleted because of declining salmon runs  
19      caused by habitat damage such as the state barrier culverts.

20           In addition to trying to offer your Honor some perspective on  
21      harm from the tribal members, we will, in a manner of speaking,  
22      offer a view of harm from the fish's view. There will be a  
23      number of tribal biologists who will provide a primer, so to  
24      speak, on salmon biology, without which you can't really  
25      understand the effects of these culverts.

1       They will talk about the life history of these fish and how,  
2 particularly with regard to Coho and Steelhead and Chinook, they  
3 have long freshwater residences in their juvenile years, which  
4 means that these culverts not only block the adults coming back  
5 to spawn, but the juveniles as well. The tribal biological  
6 witnesses will testify that habitat is a crucial determinant of  
7 production of salmon; that habitat decline, degradation, and loss  
8 is the driver of the depleted salmon runs that we are  
9 experiencing in the case area, and that will be shown in the  
10 evidence.

11       The effects of that lost production on tribal harvest will be  
12 explained by the biologists in terms of lost numbers, lost days  
13 fishing, and lost opportunity to use all the usual and accustomed  
14 places that were reserved for their use in the treaties.

15       Following that background, your Honor, Dr. Martin Fox, who is  
16 a tribal fisheries biologist from the Muckleshoot Tribe as well  
17 as a forest engineer, will testify regarding the precise  
18 mechanisms by which these culverts affect fish passage and fish  
19 habitat. And he will, in a nutshell, indicate that there is a  
20 basic rule: The narrower the culvert in relation to stream  
21 width, the greater the risk to fish passage and to the fish  
22 habitat.

23       Dr. Fox will describe three primary types of culverts that  
24 are used to provide fish passage: hydraulic, no slope, and stream  
25 simulation. The first two are narrower, and Dr. Fox will testify

1 about their adverse effects on fish passage and habitat. The  
2 third methodology, known as stream simulation, produces a wider  
3 culvert, and Dr. Fox will describe the results of those culverts  
4 both in terms of literature search and his own observations in  
5 the case area of culverts corrected by the State, in order to  
6 come to a recommendation that that design is the one that should  
7 be used as a default to correct the state barriers.

8 I think if you asked any of the biologists, whether the  
9 plaintiffs' witnesses or the State's in this case, they will tell  
10 you culverts are not the only habitat problem out there. And  
11 Mike McHenry, a habitat biologist from the Lower Elwha Tribe who  
12 will testify early in the trial, today I hope, will describe how  
13 culverts relate to the other habitat problems and how a  
14 correction of culverts relates to the other habitat problems in a  
15 given watershed. And he will testify based on his extensive  
16 experience in stream restoration that in the absence of a very  
17 detailed watershed assessment, something which is expensive and  
18 difficult to come up with, that gives you a detailed list of  
19 priorities, there is a general principle you can follow. It  
20 gives you a hierarchical ranking of how to go about restoring  
21 fish habitat in the watershed.

22 The first thing that Mr. McHenry will say you do is to  
23 protect good habitat that's functional. And the next thing you  
24 do is to reconnect the pieces; to take down barriers within the  
25 watershed so that the fish can move and so the stream processes

1 of sediment transport, wood, etcetera, can function. It is only  
2 after those first two that you get to actually looking at the  
3 degraded habitat and restoring it, the types of activities that  
4 actually occupy a lot of what goes on for salmon restoration for  
5 the state.

6 These habitat biologists will also point out the practical  
7 advantages of culvert correction as a restoration tool, including  
8 the fact that the science behind it is well-known; it is easy to  
9 monitor the projects and their results; when there is state  
10 culverts involved, they involve principally state-owned land, so  
11 there's no impact on private landowners; and they are highly cost  
12 effective.

13 The last witness, if you will, who won't actually be on the  
14 stand but will be in all those fat binders up next to the Court,  
15 is the State of Washington speaking through numerous exhibits,  
16 numerous reports by the State, including reports authored by  
17 their witnesses.

18 The earliest of those state documents that will be presented  
19 in evidence is a 1949 pamphlet by the Department of Fisheries and  
20 Wildlife called "The Salmon Crisis." And even at that early  
21 date, the Department of Fisheries indicated that the prime cause  
22 of depleted salmon runs in the case area was loss of access to  
23 habitat. And that report, that pamphlet, described what it  
24 called an immense lost frontier of inaccessible habitat through  
25 culverts and other barriers to fish passage.

1       There are a few other key documents that I'm sure your Honor  
2 will have a chance to look at but will be mentioned repeatedly.  
3       I also mentioned those fish passage performance reports done more  
4 or less annually by DOT and DFW. They describe the DOT's culvert  
5 correction programs. They describe their projects, their costs.  
6       And prior to this litigation being filed, they described in  
7 candid terms the harm that state culverts inflict on salmon and  
8 salmon passage, calling those barrier culverts critical  
9 components in the effort to restore wild salmon and a very cost-  
10 effective means for habitat restoration.

11       The last two documents that will be offered in evidence, and  
12 I want to particularly point out, are also Department of  
13 Fisheries and Wildlife documents. The 2000 document entitled  
14 "Fish Passage Barrier and Surface Water Diversion Screening  
15 Assessment and Prioritization Manual" - which if I were a Navy  
16 man I would turn that into an unpronounceable acronym, but I'm  
17 simply going to call it the assessment manual, I think that's how  
18 most of the witnesses will refer to it - indicates how the State  
19 of Washington and the Department of Fisheries goes about  
20 determining whether a culvert is a barrier and determining what  
21 habitat is available.

22       The second DFW document, in 2003, is entitled "Design of Road  
23 Culverts for Fish Passages," which describes the methods widely  
24 used by the State to correct fish passage barriers, and it  
25 critiques those methods, again, in candid terms.

1       In summary, your Honor, the evidence will show that state  
2 fish passage barriers are a major problem for fish, their  
3 habitat, and treaty fisheries. And the question will become what  
4 to do about it. As I mentioned, the Department of  
5 Transportation's pace to correct its barriers is slow. At  
6 current rates, the evidence will show it is on pace to fix its  
7 barriers in the case area in 50 to 80 years. Budget plans for  
8 the department will be in evidence to show no sign of a great  
9 increase in correction rate. The Department of Transportation  
10 continues to use hydraulic designs that are not adequate for  
11 juvenile are passage, high maintenance, and easily break down.

12       The Department of Natural Resources, according to the  
13 evidence, is facing funding shortages for its culvert  
14 corrections. And in the admitted facts, you will find state  
15 parks has fixed one of its barrier culverts.

16       The State contends in its contentions of fact that its  
17 current programs are sufficient to provide for treaty fisheries  
18 into the future. The evidence will show State practices are  
19 insufficient and that they will likely continue in the absence of  
20 an injunction. Plaintiffs therefore will be proposing that the  
21 Court adopt a five-step injunction to require correction of the  
22 state's culverts. Each step in this five-step injunction, your  
23 Honor, reflects the application of the principles of equity that  
24 govern the grant of extraordinary relief of injunction.

25       The first step is to determine what culverts to fix. The

1 evidence will show that the State has assessed its barriers  
2 within the case area; that it knows with fairly good accuracy  
3 what those barriers are. And although that assessment relies on  
4 methodology that plaintiffs' witnesses will tell you does not  
5 adequately account for juvenile passage, the plaintiffs are not  
6 asking the State to redo its assessment. They are asking that  
7 the injunction rely on the existing documentation of what is a  
8 barrier; that, and what we can prove at trial with regard to the  
9 specific culvert.

10 Plaintiffs propose that the State be required in the  
11 injunction to fix all of its barrier culverts because that is  
12 most consistent with treaty understanding and intent and with the  
13 law regarding reserved treaty rights to natural resources.

14 And in regard to fixing all of the culverts, your Honor, the  
15 plaintiffs expect evidence from the State regarding the numbers  
16 of non-state-owned barrier culverts, the same streams where state  
17 culverts are located. And we anticipate some argument that the  
18 fact that there are other barriers there should reduce the  
19 State's obligations.

20 Plaintiffs will therefore offer evidence to show why the  
21 presence of those non-state barriers should not insulate the  
22 State from relief, including the fact that a large number of  
23 those non-state barriers are in fact partial barriers. They pass  
24 fish some of the time, some species, not all the time. Thus,  
25 when a state barrier upstream is corrected, the fish can still,

1 some of them, get through that downstream barrier and benefit  
2 from the correction.

3 Secondly, many of the Department of Transportation's barriers  
4 in these basins are at the bottom of the basin for the simple  
5 reason, as Mr. McHenry will testify, when you're building a big  
6 road, you put it where it's easy, right down the river bottom,  
7 where it truncates, crosses every tributary stream to the lowest  
8 on the system.

9 The State reports will indicate a third reason why these  
10 non-state barriers are not important, which is a great many of  
11 them are being corrected now. And finally, as a matter of  
12 equity, the fact that someone else may have done wrong does not  
13 relieve the State of its own obligations under the treaty.

14 The second step in the five-step injunction, your Honor, is  
15 to set a firm schedule for direction on the state's barriers.  
16 For the Department of Transportation, the plaintiffs propose that  
17 they be fixed, along with those of the Department of Fish and  
18 Wildlife and the Parks Commission, by 2016, a date that is  
19 already in state forest practice law with regard to forest lands  
20 and which the admitted facts show has been adopted by the  
21 Department of Fish and Wildlife and the Parks Commission as a  
22 goal for correcting their culverts.

23 With regard to the Department of Transportation, the  
24 plaintiffs propose that all their barriers be corrected within 20  
25 years from judgment, again, a deadline that has been borrowed

1 from state practices, because the evidence will show that the  
2 Department of Transportation through the 1990s, and at least  
3 until 2002, itself had a stated goal of correcting all its  
4 barrier culverts within 20 years.

5 The 20-year delay in correction of DOT culverts, the evidence  
6 will show, will permit other habitat efforts to occur in these  
7 basins, so that when the state culverts are corrected and the  
8 fish arrive, the habitat can have already been worked on.

9 Conversely, by not extending DOT corrections beyond 20 years,  
10 when other habitat work is done, it will not be frustrated in its  
11 effect by the presence of the remaining DOT barriers.

12 Plaintiffs propose two equitable exceptions to that 20-year  
13 deadline. The first, again borrowed from current state practice,  
14 is that the State can defer correction of what it calls no  
15 significant gain or limited gain barriers, those that block less  
16 than 200 meters of habitat, until the end of that culvert's  
17 useful life; in other words, when it's fixed for some reason  
18 besides fish passage.

19 And the second equitable deferral of the State's correction  
20 obligation would be the Department of Transportation could defer  
21 to the end of the useful life of the culverts, correction of  
22 culverts that affect up to ten percent of the total habitat  
23 blocked by DOT culverts. And because, as the evidence will show,  
24 there are a large number of DOT barriers, each with a fairly  
25 small amount of habitat, deferring correction of up to ten

1 percent of the habitat means deferring correction of more than  
2 ten percent of the barriers and deferring the costs associated  
3 with it.

4 On the subject of costs, which of course will be a  
5 significant issue, the costs of actual corrections that have been  
6 done by the State will be in evidence. And even with the  
7 substantial number of barriers that are present that would have  
8 to be fixed under the injunction, those costs will add up to a  
9 very small fraction of the state's roads and budgets which, for  
10 the Department of Transportation alone, are approximately \$3  
11 billion in the current biennium.

12 In considering costs, the plaintiffs would ask that the Court  
13 also consider the part of the cost of correction that is fairly  
14 attributable to the proposed injunction. What I mean is this:  
15 Culverts fail anyway. The evidence will show they have a  
16 hydraulic life, 50 to 80 years. And at the end of that, they  
17 must be replaced or repaired. And under current state law and  
18 policy, when they are replaced or repaired, they must be made  
19 fish passable.

20 So the effect of the injunction, your Honor, is not to  
21 require a new correction, but to advance a correction that will  
22 have to happen anyway. And the cost that's fairly attributable  
23 to the injunction is only that advancement in time and perhaps  
24 the fact that it would be done better under the tribe's -- the  
25 plaintiffs' proposed correction standards.

1       And if, as the evidence promises, state agencies are in fact  
2 fixing increasing numbers of their culverts using this stream  
3 simulation method, the difference between correcting under the  
4 injunction and correcting under state law may be solely the  
5 difference in timing.

6       The third step in the plaintiffs' proposed injunction is to  
7 require that the State fix its culverts properly. Plaintiffs  
8 proposed a performance-based standard for what is proper, which  
9 is that the culverts be made to pass all salmon at all life  
10 stages. Again, that is a standard drawn from existing state law,  
11 from the Forest Practice Act and regulations. The means to  
12 achieve that standard would be to require use of best fish  
13 passage design science, except in emergencies or when the use of  
14 the best science is infeasible. Again, there are a number of  
15 elements built into this proposal to allow flexibility and to be  
16 cognizant of the different equities involved to fix the culverts.

17       Fixing the current backlog of culverts will not fully remedy  
18 the violation of the plaintiffs' rights. The processes that  
19 created those barriers are still at work in those streams. And  
20 the evidence will show that additional barriers are very likely  
21 to form in the future.

22       In order to avoid that happening, the plaintiffs request that  
23 the State be enjoined to perform maintenance on its culverts,  
24 that it be enjoined to inspect those culverts, and that it be  
25 required to periodically reassess the status of those culverts

1       that it has already looked at and found not to be barriers so  
2       that it will in the future be able to determine which have become  
3       barriers, and that the State then be required to correct those  
4       within a reasonable time.

5           Finally, the fifth element, your Honor, in the proposed  
6       injunction is that the State be required to actually monitor its  
7       corrections, and that when it finds a correction has not been  
8       built according to a design or not been built in accordance with  
9       the injunction, it take action to correct that and, should it  
10      find that the correction is not functioning as it should, it take  
11      steps to correct that.

12       In conclusion, your Honor, this trial that we're about to  
13      begin is not going to be short. Almost all the testimony is  
14      expert testimony. There will be a large number of exhibits  
15      offered. But beneath all that pile of complex evidence, there  
16      are four simple themes we would like the Court to keep in mind.

17       First, broken state culverts cause significant harm to the  
18      fish, their habitat, and to the tribes who depend on those  
19      fisheries. Second, rendering those culverts passable is a vital  
20      part of overall salmon restoration.

21       Third, the science and technology to fix those culverts is  
22      known. And fourth, the State's efforts to date to reopen the  
23      lost frontier it described in its 1949 pamphlet have been too  
24      little and too late.

25       In short, the answer to the question I posed at the

beginning, should the State be required to do something differently in response to the summary judgment decision in this case, is yes, the State should be made to do something different. That summary judgment decision declared the tribes' treaty rights. Now is the time to enforce them.

I believe Mr. Monson would like to say a few words.

THE COURT: Thank you.

MR. MONSON: Good morning, your Honor. I will be very brief. When the tribes filed their request for determination in this case, the United States filed its response and largely supported the tribes, both in terms of seeking declaratory relief and also in creating the terms of an injunction that would effectuate the tribes' treaty rights, and we still stand by that support.

We believe -- in our opening request -- response to the request for a determination, we sought both declaratory relief, similar to what the tribes had sought, as well as injunctive relief enjoining the State to correct its fish-blocking culverts. And we believe this Court has fulfilled the request with respect to the declaratory relief through its order on summary -- cross-motion for summary -- partial summary judgment. Excuse me. And we also believe that the tribes' requested injunctive relief fulfills the relief that the United States sought in its response for the request for determination that was filed in 2001 in this case.

1       We also believe that the request that the tribes are seeking,  
2       the injunctive relief that they're seeking is reasonable and is  
3       within the power of the State to accomplish and is also  
4       consistent with salmon recovery principles that the Northwest is  
5       currently undergoing.

6       We believe that the tribes -- the elements of the injunction  
7       that Mr. Sledd went through just a few moments ago are very much  
8       consistent with overall salmon policy, and we believe, as  
9       Mr. Sledd alluded to, that the correction of fish-blocking  
10      culverts and the opening of fish habitat is a very important  
11      element and one of the first priorities to be accomplished in  
12      salmon recovery. We believe that 2016 date that the state  
13      agencies, the non-DOT state agencies, such as DNR and parks  
14      agencies, is one that's consistent. It's also one the U.S.  
15      Forest Service has agreed to abide by, and it believes that it  
16      will be able to meet that deadline as well with respect to its  
17      inadequate fish-blocking culverts.

18       We believe that the 20-year period for the correction of DOT  
19      is also reasonable and that is something that will not unduly tax  
20      the state's budget, and we believe the evidence will show that.  
21      As Mr. Sledd indicated, what's really being sought is not so much  
22      new money being spent on culverts, but just money that would have  
23      to be spent at some point in the future being spent sooner than  
24      perhaps otherwise the State would prefer to spend it.

25       The United States is not going to be proposing -- is not

1 going to be presenting its own independent case-in-chief. We  
2 would join with the tribes in their case-in-chief, and we will be  
3 presenting perhaps a couple of rebuttal witnesses, one from the  
4 Forest Service to discuss their efforts and their funding status,  
5 and one from the National Marine Fisheries Service, the  
6 scientists who will discuss the correction of culverts and the  
7 opening of those linkages between habitats for fish and where  
8 they fit in the overall scheme of salmon restoration.

9 With that, I think I will sit down. I think the Court will  
10 hear plenty of testimony and argument. And I would just like to  
11 thank the Court for its time and letting me speak.

12 THE COURT: Thank you, Mr. Monson.

13 The State's opening.

14 MR. TOMISSE: Good morning, your Honor. Once again, I  
15 am Rene Tomisser on behalf of the State of Washington in this  
16 case.

17 Mr. Sledd talks about the volume of material that's been  
18 presented to this Court. The record that's before the Court  
19 documents the history of salmon recovery and restoration in  
20 Washington. Where Mr. Sledd sees failure, I see hope, progress,  
21 and overwhelming evidence that substantial efforts have been made  
22 and are still underway. It is, in fact, I believe, one of the  
23 finest examples of different agencies, different people,  
24 diverging interests, all coming together and realizing that the  
25 way to recover this resource that is so important to all is to

1 work together through a coordinated plan, a coordinated plan that  
2 in fact has become the law, both federal law and state law.

3 It is a shame when litigation itself has become a barrier and  
4 an ongoing distraction to the progress that we are all working so  
5 hard to make. It is disappointing to hear from our federal and  
6 tribal partners the disparagement of the efforts that have been  
7 made. So before we get into examinations, cross-examinations,  
8 and argument on this point, your Honor, I think it is worth  
9 pausing briefly on behalf of the State to say thank you to our  
10 federal and tribal partners for the efforts that they make, to my  
11 clients on this side of the room, the state biologists, all of  
12 the people in this room who have dedicated their careers to  
13 making progress in this area.

14 And so it is disappointing to hear the request for an  
15 injunction in this case, an injunction that would have the effect  
16 and risk the undermining of the scientifically-based  
17 comprehensive plans that have been agreed to by the parties and  
18 are at the foundation of the progress that we made; an injunction  
19 that would undermine -- that would give primacy to barrier  
20 remediation that is out of step with the plans that are in place,  
21 the plans that have been agreed to by our tribal partners.

22 The Court having found -- made a ruling on partial summary  
23 judgment in this case is not required in some sort of a rigid,  
24 lockstep fashion to order an injunction. The Court is sitting in  
25 equity, and it is entitled to balance all the factors that come

1 to bear on whether or not an injunction in this case is warranted  
2 and, what we believe the evidence in this case will show, that an  
3 injunction in this case would be improper in placing a primacy on  
4 barriers as requested by the tribes, and that the Court should  
5 consider four primary factors in exercising its discretion not to  
6 grant an injunction in this case.

7 First, there are comprehensive and scientifically-based plans  
8 for salmon restoration that are in place, that are a matter of  
9 law, and have been approved by state, federal, and tribal  
10 authorities. The reallocation of funding that would be required  
11 in order to meet the pace of correction sought by the tribes  
12 would certainly undermine those plans, with other parts of the  
13 plans being unable to be funded if we were to focus our efforts  
14 as greatly on barrier corrections as the tribes would have us do  
15 through these injunctions. These plans are in place. They're  
16 required by law. They've been backed up by the commitment of  
17 hundreds of millions of dollars.

18 Hopefully to the pleasure of this Court, the Court will see  
19 that it is not faced with a recalcitrant state agency who is  
20 simply unwilling to do what should be required. But in fact, the  
21 story of the State's effort on this case mark working in  
22 cooperation with our partners in good faith, in fact beginning  
23 our own project for the remediation of culvert barriers in 1991,  
24 a decade before anyone filed suit, all done without the threat of  
25 federal court intervention, all done without the requirement of

1           federal oversight.

2           The third factor, your Honor, is the simple review of the  
3           papers for the last year. We are not going faster because we  
4           don't want to, but the budget is a constraint that the Court has  
5           to take into account. There simply is not the money to  
6           reallocating to culverts in the disproportionate way sought by the  
7           plaintiffs in this case.

8           We're existing at a point in time that the Court will hear  
9           from Victor Moore, the director of OFM, which is essentially the  
10          budget arm of the governors's office, will describe what the  
11          situation is economically for the state and will describe to the  
12          Court the fact that incredibly difficult decisions, policy-based  
13          decisions, are having to be made on what can we fund, what can we  
14          do for our citizens.

15          We're at a period of time where the most vulnerable members  
16          of our society - the elderly, the young, the sick - are being  
17          told that their programs that they depend on are either going to  
18          have to be reduced or go away entirely. And in spite of the  
19          budget challenges that we face, the evidence in this case will  
20          show that the State's commitment to salmon restoration has  
21          maintained and that, even as other programs have been forced to  
22          cut back and be reduced, the State's efforts for salmon  
23          restoration have remained constant if not slightly increasing  
24          over time.

25          Finally, your Honor, another very practical point here is the

1 reallocation of resources sought by the tribes in this case to  
2 fix the culverts within a 20-year period would be a \$2 billion  
3 reallocation of salmon restoration resources, a reallocation of  
4 funding for which the tribes back up with no evidence that it  
5 would make any significant difference whatsoever in the actual  
6 production of salmon.

7 If we look carefully at what's happening, your Honor,  
8 beginning at the watershed level within the case area that we  
9 have here, if you look at each water resource area, each  
10 watershed, there are comprehensive plans that are in place based  
11 on what is needed by each individual watershed. Every watershed  
12 is different. There are different species. They have different  
13 needs. A one-size-fits-all injunction to speed up the culvert  
14 barriers is going to be out of step with what those plans are  
15 calling for. The watersheds develop plans based on technical  
16 input from fisheries experts that you will hear from in this  
17 case, along with community members, tribal and state members who  
18 step in to review these plans.

19 These plans are then passed up to regional groups, fisheries  
20 management groups, who coordinate and prioritize the plans coming  
21 from specific watersheds, and then further up the chain to state  
22 and federal officials who then approve the plans, prioritize  
23 them, and fund them to the greatest extent possible. One such  
24 organization that we will hear about, your Honor, in this case is  
25 the state SRF Board, Salmon Recovery Funding Board. It has

1 placed all -- approving plans that recognize that culverts are  
2 only one aspect of salmon restoration challenges in this state,  
3 and fund them and prioritize them in accordance with the way the  
4 scientists have suggested that they be done, none of which call  
5 for the sort of primacies that the tribes urge this Court to  
6 achieve.

7 There's an extensive plan that is in place for Puget Sound,  
8 the Puget Sound recovery region. You can see that these plans do  
9 not happen overnight. It is estimated that it will be about 50  
10 years to achieve as much progress as can be made at a cost of  
11 \$142 billion -- \$1.42 billion over the first ten years, excuse  
12 me.

13 These plans are in place and have been approved by NOAA's  
14 fisheries and are funded accordingly. There are major limiting  
15 factors, as you can see in these plans. All of these need to be  
16 addressed, and to be addressed in the way that the scientists  
17 have indicated, barriers being only one of those factors and not  
18 the primary factor.

19 When we look at the efforts that have been made, these  
20 efforts have all been made, your Honor, without the need for  
21 court intervention, without a court presiding over how these  
22 resources need to be allocated in order to do the best for  
23 salmon. That is a job for the scientists, federal, tribal, and  
24 state experts working collaboratively to develop a plan and then  
25 executing it in order to get the best bang for the buck to help

1 save this resource.

2 When we look at some of the scope of some of these efforts  
3 that have been made, you look at the state -- just the example of  
4 the state salmon funding board in this case, this does not  
5 include money spent separately through the Department of  
6 Transportation and other agencies, but you can see already in the  
7 history of this program, a quarter of a billion dollars has been  
8 expended through grants, consistent with the plans for the  
9 recovery of these species, and that barrier passage is one of  
10 those elements; tens of millions of dollars devoted to barrier  
11 passage out of that, and devoting it in a way that's consistent  
12 with the planning that has gone into Puget Sound recovery for all  
13 populations of salmon.

14 The tribes in this case take the position implicitly asking  
15 this Court to assume that prior to the existence of any state  
16 barriers, that they are entitled to some certain abundance of  
17 salmon that existed at that time. We think that that proposition  
18 is not only legally dubious, but factually unproven in this case.

19 Thirty-five years ago, this Court set out its view of the  
20 Stevens Treaty, a view that has been affirmed in large part by  
21 the United States Supreme Court, setting out the rights of the  
22 tribes in this situation and ensuring to the tribes a fair share  
23 of the harvest. In this case, the tribes are asking the Court to  
24 essentially restore this abundance to whatever existed without  
25 state barriers, to have those barriers taken out of the case, is

1 something that the tribes simply have no evidence of. Nobody  
2 does.

3 We don't know how many salmon existed prior to the  
4 construction of state barriers. We don't know what the  
5 diminution of the harvest or the abundance of salmon were due to  
6 barriers, let alone state-caused barriers, and no idea how much  
7 additional production is going to be necessary in order to  
8 achieve this mythical pre-barrier level. The plaintiffs' case  
9 ultimately fails simply for the speculation that would be  
10 required in a court's order to attain something that no one is  
11 going to be able to measure. The effectiveness of the Court's  
12 order is a consideration that militates [sic] against --  
13 mitigates against the issuance of an injunction in this case.

14 Given when all the state barriers have been repaired, and the  
15 evidence in this case will show that the State owns actually only  
16 a small percentage of the blocking culverts in the state and in  
17 the case area, we don't know how many fish are going to be  
18 produced as a result of that area. That doesn't mean that it  
19 shouldn't have been done, and we are certainly doing it, but  
20 there is no fish emergency that justifies the undue primacy to  
21 that project out of step with the plan that has been agreed to.

22 On a more positive side of the equation, your Honor, the  
23 harvest numbers -- and we will hear a lot of information about  
24 the harvest in this case. These harvest numbers have been agreed  
25 to by the parties, although with different views essentially on

1 what they mean. I think that for the Court's benefit here, I  
2 have highlighted some portions of it, essentially looking at the  
3 harvest numbers over the last decades, the harvest numbers that  
4 are essentially stable over that period of time. And if the  
5 Court looks at the top of the very busy chart, it's also very  
6 relatively stable compared to the time immediately after the  
7 Boldt decision in this case. When we look at these numbers  
8 graphically, your Honor, what we see are a couple of things. We  
9 see some extreme spikes in harvest in the late 80s and early 90s,  
10 but overall what we see is rising harvest numbers from the late  
11 90s and rough stability over the last decade in these harvest  
12 numbers.

13 When you go back and you look at the plaintiffs -- I think in  
14 this case if you look at this chart, you can see that it's a  
15 decrease from those higher spikes. That's certainly true, your  
16 Honor, but it is also deceptive. When you go back and look at  
17 those spikes and you look at the harvest numbers, what you'll see  
18 is in the late 80s to early 90s, we had extraordinary numbers of  
19 Sockeye salmon being harvested, as well as extremely high numbers  
20 of Pink salmon. The parties and biologists have agreed that  
21 those Sockeye harvests are consistently at least 90 percent of  
22 Canadian origin. That has nothing to do with barriers in the  
23 State of Washington.

24 And when you look at those numbers and the spikes that we  
25 see, you will see a very strong correlation, in fact a direct

1 correlation, or very close to, between those spikes in the late  
2 80s and the very high peaks of Pink and Sockeye salmon during the  
3 same period of time.

4 Fixing the state barriers in this case is going to make no  
5 difference, your Honor, in what the Canadian origin fisheries do,  
6 or such an extremely small difference that I don't believe anyone  
7 thinks that they can actually measure it.

8 The harvests that are going on now are agreed to in a process  
9 by the parties in which the scientists determine harvest levels  
10 that can be maintained at a sustainable rate, not at a rate that  
11 is going to stress any of the species through overharvesting.

12 The other interesting thing to note on this graphical  
13 representation here of harvests, your Honor, is implicitly the  
14 tribes argue that it is the state barriers that have caused  
15 diminution of harvest numbers. But when you look at the state  
16 road system and all of the barriers that came along with the  
17 construction of the state road system, you go back to 1974 --  
18 actually, 1978. Let's see if I can draw a straight line.

19 The point I'm trying to make, your Honor, is that in 1968  
20 [sic], the State maintained about 20,000 lane miles of road,  
21 which works out to about 7,000 center-line miles, with all of the  
22 culvert barriers that came along with it. Today we have about  
23 7,000 center-line miles.

24 The road system and its barriers have been constant within  
25 96 percent of its capacity now for 40 years, and yet we see these

1       extreme fluctuations, suggesting that in fact there is no  
2       relationship, or a minimal relationship, between barriers and  
3       harvest rates. So when we turn to barriers in this case, we need  
4       to look at what has been done, what remains to do.

5           I want to first talk about the four Hs, your Honor. This is  
6       an approach to salmon restoration that you will hear from several  
7       experts. We'll talk about each of these four elements in the  
8       case, each needing attention in order to recover salmon  
9       restoration. What the plaintiffs suggest in this case is that we  
10      focus on habitat and give a primacy to habitat, and not just  
11      habitat, but to passage within the habitat rather than following  
12      a comprehensive approach to salmon restoration.

13           If we look just at the habitat numbers -- and this is from  
14      the salmon recovery plan, your Honor. This chart and graph shows  
15      the habitat portion of this problem, along with the major  
16      limiting factors within the habitat. And you can see those going  
17      around the outside of the dial, with nearshore at the top,  
18      riparian habitat and working around. Those are all pressures on  
19      the habitat portion of the equation. And what you can see from  
20      looking at this depiction, your Honor, is that in terms of the  
21      environmentally significant units, barriers affect far fewer than  
22      most of the other habitat pressures, but in fact, it's the area  
23      where we have made the most progress, suggesting this is not an  
24      appropriate candidate for the sort of undue primacy sought to be  
25      given it by the tribes.

1       When we look at the barriers that have been done, the state  
2       of Washington began its program in 1991, extensive surveying was  
3       done, scientific analysis was done to determine how barriers  
4       should be fixed, and it has evolved over time. An extensive  
5       inventory was conducted. And in fact, the state of Washington's  
6       program was amongst the earliest in the nation and is  
7       consistently looked to as in fact a model of how to approach  
8       salmon restoration with a dedicated barrier correction program.

9       Since this program was started, the Department of  
10      Transportation has corrected about 225 barriers. This is in  
11      addition to barriers corrected through other programs. These are  
12      simply the DOT-owned corrections. And what you can see is steady  
13      progress being made with corrections being done.

14      Similarly, although at a much faster rate, the Department of  
15      Natural Resources is dealing essentially with forest roads,  
16      correcting barriers at even a much faster rate, nearly a thousand  
17      barriers corrected by the Department of Natural Resources. This  
18      is substantial effort, your Honor, and substantial progress that  
19      has been made in a dedicated way.

20      So what remains to be done? Your Honor, the parties agree  
21      that for the Department of Transportation, there are about 807  
22      barriers that remain to be fixed that have significant habitat  
23      associated with them. The 200 linear meters mentioned by  
24      Mr. Sledd is the figure that's most commonly used. 807 of them  
25      to fix. They cost about \$2.3 million apiece to fix. That does

1 not include inflation. This number is based on projects that we  
2 know that are upcoming and the engineering costs that have been  
3 associated with them. That's a big number.

4 And the Court may wonder, well, why is it so expensive to fix  
5 these culverts? I have just a couple of quick examples to show  
6 the Court what is involved. The design, the permitting, the  
7 scope of excavation in order to do the job right, as Mr. Sledd  
8 suggests we should, and as we agree that we should, is extensive.

9 So the first example to put before the Court is for Mill  
10 Creek up on Highway 2. This is an 11-foot culvert that was  
11 replaced. It is kind of on the medium to smaller side of the  
12 fixes, at a cost of \$1.6 million. This is what it looked like  
13 before. There's a shot that shows kind of the midpoint of  
14 construction. You can see the dramatic amount of work that goes  
15 into getting to this part, to finally complete the project. It  
16 is a lot of work.

17 One additional example from Terrell Creek, a slightly larger  
18 project, a 12-foot steel culvert was replaced. I selected this  
19 one, simply because it came out right on the average of  
20 2.3 million, for the Court to see. Once again, you can see the  
21 extensive work that goes into fixing this kind of problem. This  
22 is what Terrell Creek looked like before the State performed its  
23 remediation. There's a shot partway through construction. For  
24 more of a view of what's involved in this, your Honor, as you can  
25 see, you just don't send a maintenance crew out with a couple of

1 shovels and a bag of cement to fix culverts in one afternoon.

2 There's what we have at the end of the process.

3 So if we look at the scale of work to be done, 807 culverts  
4 at \$2.3 million apiece, roughly, that works out to about  
5 \$1.8 billion. And that is just for the Department of  
6 Transportation, your Honor. It's a number that doesn't include  
7 inflation that would have to be factored into those figures.

8 So how does all this get paid for? And this is not counting  
9 the SRF Board or grants coming from other places. How does DOT  
10 pay to get these things done? There are two primary funding  
11 mechanisms and then a smaller program as well. The two primary  
12 funding mechanisms come through what is known as the I-4 budget.  
13 That is a specific section within the Department of  
14 Transportation budget that exists every year.

15 Within that budget, there is a specific line item that the  
16 legislature has dedicated to the funding of barrier corrections.  
17 That budget is important to watch as a milestone, your Honor,  
18 because that budget follows the priority index fairly closely,  
19 not precisely, but essentially is worked in that order so that we  
20 are getting the most gain we can for the fixes that are done.

21 And the other funding mechanism that we use is simply that  
22 culverts get fixed in the course of highway improvement projects.  
23 Most of the time when we're going to be fixing a section of  
24 highway, if there's a culvert within the boundaries of the  
25 project, then generally those get fixed as well.

1       The problem with looking at that, your Honor, as kind of an  
2       apples to apples is, when the highway improvement projects get  
3       fixed, those are just random, just kind of wherever the road  
4       happens to be. They're not done in the order that the priority  
5       index would suggest, but we generally try to do them anyway even  
6       if they aren't in the ideal order in the index. The I-4 budget  
7       looks much more closely to the index that has been established.

8           You can see historically back to 1991, the corrections that  
9       are done on an annual basis in this case. The blue bars in this  
10      case are culverts that were repaired through the I-4 budget. The  
11      red bars are the fixes done through the highway improvement  
12      project. And then an average -- a combined average with the  
13      green. Once again, this doesn't include fixes coming from other  
14      sources.

15           The interesting thing to know about this chart, as your Honor  
16       will learn, is even though there are fewer fixes on average in  
17       the I-4 budget, we actually get more lineal gain out of them  
18       because they are being done -- tied more closely to what the  
19       priority index would suggest.

20           The other important point to be brought out, your Honor, in  
21       terms of asking the State to accelerate, is a problem of  
22       diminishing returns. With 807 culverts, once you get out into  
23       the final few hundreds of these, you end up getting very little  
24       gain, relatively speaking. So we're getting the most we can now  
25       through the I-4 budget, picking off the better projects and then

1 working down the list so that we get the most bang for our buck.

2 Historically -- and I should also remind the Court that all  
3 of this has been done, budgeted, funded and completed without  
4 court intervention and federal oversight. So in order to fix the  
5 807 barriers that remain in 20 years, the simple math on that  
6 suggests that we need to do about 40 barriers per year.

7 Every year, going back to the mid '90s, the Court can see  
8 that the legislature has devoted money just to the I-4 portion of  
9 this budget. This is in addition to all of the other fixes that  
10 are being done. Every year the State's commitment to that  
11 program has gone up at least a little bit, in spite of the budget  
12 difficulties that we're facing. We expect to have about  
13 \$17 million for the upcoming biennium, and essentially  
14 stabilizing, we would think. Although predicting future budgets,  
15 your Honor, is difficult to do, we would expect about \$15 million  
16 or so per biennium for the I-4 budget.

17 In order to do the corrections suggested by the plaintiffs,  
18 for the cost of these culverts, it would require about  
19 \$92 million a year, or \$185 million for every biennium. That is  
20 an order of magnitude greater than what the legislative process  
21 has determined is the appropriate level for funding of these  
22 barriers. It would be a reallocation of resources forced by the  
23 Court on the State of Washington to the tune of about  
24 \$170 million per biennium, and it would need to come through a  
25 program similar to this I-4 budget, your Honor, in order to

1 ensure that the culvert repairs were being fixed in the order  
2 suggested by the index. It is this budget that gives us our best  
3 key to how that should be done.

4 The parties in this case, as you can note already, will  
5 dispute what the costs of fixing the culverts is in this case.  
6 No matter where the Court lands, in terms of what its thought is  
7 about future costs of culverts, it's going to be more,  
8 substantially more, than the legislature budgets through the I-4  
9 program to get these done. And it would be in fact a step of  
10 institutional reform of the state's budget and salmon restoration  
11 funding plans in order to accomplish that. Again, there's no  
12 certainty of return in terms of additional salmon being produced.

13 I mentioned briefly at the outset, your Honor, Victor Moore  
14 from OFM will be here to explain what the State is doing to try  
15 and overcome what was a \$9 billion deficit last year, and the  
16 fact that if money has to be reallocated to the I-4 budget or  
17 some other program at a rate of \$195 million a biennium, it's got  
18 to come from somewhere. Something is not going to be done if we  
19 have to put a primacy on culverts due to an injunction, an  
20 injunction that is not based on science.

21 The final consideration for the Court in this case simply has  
22 to do with whether or not an injunction by the Court will  
23 actually be effective, effective at producing fish in a way that  
24 is relevant to the treaty rights of the tribes. What we know in  
25 this case, your Honor, is that the State owns a very small

1 percentage of the culverts at issue. Most of the culverts are  
2 owned by other landowners.

3 I have an example here from Little Bear Creek. I will zoom  
4 in just a little bit. In this area, we can see nine state  
5 barriers, 131 non-state barriers, and they're color coded. I  
6 hope the monitor is clear enough to see that. This is a problem  
7 with accelerating the pace of the state's barriers when there are  
8 going to be numerous barriers that still exist in the case that  
9 complicates any kind of calculation as to how much production is  
10 actually going to be gained, and we would think, as a caution to  
11 the Court, that ordering acceleration out of step with existing  
12 plans when the Court can't be certain what the return on that  
13 reallocation -- forced reallocation would be.

14 There is one other example. This is from Steilacoom and  
15 Baker Creeks up in WRIA. Number 1, 80 non-state barriers, with  
16 six partial barriers by the state. We have partial barriers,  
17 like the non-state landowners as well, your Honor, and only two  
18 partial barriers.

19 So the situation that we end up in, your Honor, is the  
20 certainty on the one hand that the Court is being asked to make a  
21 major reallocation of salmon resource funding, and on the other  
22 hand being presented with the fact that there is no evidence as  
23 to what benefit we're actually going to get if we make that  
24 reallocation; no evidence as to how many additional fish we are  
25 going to actually obtain, and how that would be relevant to any

1       treaty right that's actually held by the tribes.

2                  The uncertainty of that reallocation of resources, combined  
3                  with the speculative benefits, I would caution the Court against  
4                  issuing an injunction. A federal injunction in this case and the  
5                  decades of court oversight that would come along with it are not  
6                  necessary, and the Court should exercise its discretion to not  
7                  grant an injunction in this case.

8                  THE COURT: All right. Counsel, thank you very much.

9                  Are the plaintiffs ready to call their first witness?

10                 MR. SLEDD: Your Honor, we have a procedural question  
11                  from counsel, which is whether you would wish us to call  
12                  witnesses now or proceed to read into the record the exhibits  
13                  that we have stipulated to.

14                 THE COURT: Yes. We wanted to keep track of that, as we  
15                  talked about in the pretrial conference. So let's go ahead and  
16                  read into the record the exhibits that are either stipulated to  
17                  or agreed can come in without any objection.

18                 MR. SLEDD: Your Honor, before I start reading in the  
19                  exhibits that have been stipulated to, I did want to mention the  
20                  stipulation that the Court approved just before our final  
21                  pretrial conference with regard to these exhibits indicating the  
22                  parties would use their best efforts to come up with joint  
23                  exhibits where they had both listed them.

24                 The parties were using their best efforts quite late last  
25                  night, continuing to -- And while we suggested we wanted to get

1 those read in today, those joint exhibits, with the Court's  
2 permission, I would like an additional day to work with the  
3 State, and hopefully we can come up with something by tomorrow's  
4 session to read in the joint exhibits. But we are prepared to  
5 proceed on reading on the individual parties' exhibits that have  
6 been stipulated.

7 THE COURT: You may proceed.

8 MR. SLEDD: Thank you, your Honor.

9 We would like to enter, without objection, the following  
10 plaintiffs', all tribes', exhibits into evidence. AT-001-1,  
11 AT-002-1, AT-004-1, AT-004-2, AT-004-3, 004-6, 004-8, 004-9,  
12 004-10, 004-11, 004-12. AT-007-1, 008-1, 008-2, 008-3, 008-5,  
13 008-7, 008-8, 008-9, 008-10. AT-009-1, AT-010-2, AT-010-4.  
14 AT-011, AT-014, AT-015, 016, 017, 020, 022, 024, 025, 031.  
15 AT-037, 041, 042, 046, 047, 048, 050, 052, 053, 054, 055, 056,  
16 057, 058, 059, 060, 061, 062, 063, 064, 065, 066, 067, 068, 069,  
17 070. AT-071, 072, 081, 082, 083. AT-101, 102, 108, 109, 110,  
18 111, 112, 113, 118, 125, 129, 130, 131, 132, 133. AT-143, 144,  
19 145, 146, 147, 148, 149, 150, 153, 155, 158, 161, 162, 163, 164,  
20 165, 166, 181, 182, 186, 187, 196, 206, 210, 212, 214, 225, 226,  
21 229, 230, 231, 232, 233, 237, 239, 243, 247, 248, 249, 254, 255,  
22 257, 258, 259, 260, 262, 263, 281, 282.  
23 AT-282, 285, 286, 287, 288 and 289. AT-290, 291, 292, 302,  
24 306, 309, 310, 311, 312, 313, 315 and AT-317.

25 Mr. Monson, would you like me to read the USA exhibits, or do

1 you want to do that?

2 MR. MONSON: Please go ahead.

3 MR. SLEDD: Is that good with everybody?

4 MR. TOMISSE: Before your Honor bangs the gavel down on  
5 these, we will have to check a couple of these earlier ones on  
6 the break. Our list started later.

7 THE COURT: All right. How about the U.S. ones?

8 MR. SLEDD: Again, without objection, the plaintiffs  
9 would offer into evidence the following exhibits for the United  
10 States of America: U.S. 182, 183, 184, 185, 186, 187, 188, 189,  
11 190, and 191.

12 MR. MONSON: We think that is correct for the U.S.  
13 exhibits, your Honor.

14 THE COURT: Mr. Tomisser, what about the defense  
15 exhibits?

16 MR. TOMISSE: Defense exhibits that we believe are  
17 stipulated to, your Honor, W 085 A, W 085 S, W 087 A, W 087 B.

18 THE COURT: Hang on a second. 087 A and B.

19 MR. TOMISSE: Yes. And C and D and E.

20 087 G, W 087-I, dash J, K. W 088-A, B, D, E, F, G, H, I, J.

21 W 089 A, B, F and G. W 090 A, W 091 A. W 091 B, D, H, W. W  
22 092 A, D, E, F, G, H, I, M and O. W 093 A, B, C, D, F, G, J, L,  
23 R, S and T.

24 W 094 A, C, D and E. W 136, W 144, 146, 147, 148, 149, 152,  
25 155, 185 and 187.

1                   THE COURT: No objection?

2                   MR. SLEDD: No objection from the plaintiffs, your  
3 Honor.

4                   THE COURT: All of the defense exhibits as listed will  
5 be admitted. All of the United States exhibits as listed will  
6 also be admitted, and you can double-check -- in fact, we'll just  
7 go ahead and take our break at this point before we call our  
8 first witness. Let me have you double-check the plaintiffs  
9 exhibits, and then the first thing we'll do when we get back is  
10 deal with that and probably admit those as well and we'll get  
11 started. All right.

12                  (Recess)

13                  THE COURT: Mr. Tomisser, did you get a chance to review  
14 the proposed trial exhibits?

15                  MR. TOMISSEY: We did, your Honor, and we are fine with  
16 the list as read.

17                  THE COURT: All those listed, all the tribes' exhibits,  
18 will be admitted.

19                  MR. SLEDD: Your Honor, if I may? John Sledd. There  
20 were two exhibits stipulated to late yesterday I would like to  
21 read in now, if I may?

22                  THE COURT: Please.

23                  MR. SLEDD: I would ask, without objection, these  
24 exhibits be admitted: AT-330 and 331.

25                  THE COURT: 330 and 331 will also be admitted.

1 And the plaintiffs may call their first witness.

2 MR. DAVIES: Your Honor, we'd like to call Charlene  
3 Krise.

4 THE COURT: Good morning. We'll have you come forward  
5 and be sworn, please.

6 And the plaintiffs may call their first witness.

7 | Whereupon,

CHARLENE KRISE

9      Called as a witness, having been first duly sworn, was examined  
10     and testified as follows:

11 THE CLERK: Please state your full name for the record  
12 and spell it for the court reporter.

13 THE WITNESS: My name is Charlene Krise, C-H-A-R-L-E-N-E  
14 K-R-I-S-E.

15                   THE COURT: As you can tell, the microphone does amplify  
16 a little bit. You need to keep your voice up so everybody in the  
17 courtroom can hear you.

18 You may inquire.

19 MR. DAVIES: Thank you.

20 | DIRECT EXAMINATION

21 | By Mr. Davies:

22 | Q Thank you. Could you say where you live?

23 A I live in Shelton, Washington, in an area called Kamilche.

24 Q Are you currently an enrolled member of the Squaxin Island  
25 Tribe?

1 A I am.

2 Q Do you have family members who are also tribal members?

3 A Yes, I do.

4 Q Could you describe your family?

5 A Within the Squaxin Island Tribe, I have numerous family  
6 members. The Krieses, Whitners and -- quite a few. I don't know  
7 the total number.

8 Q Are you employed?

9 A Yes, I am.

10 Q And where do you work?

11 A I work in the Squaxin Island Museum Library, Research Center.

12 Q And could you describe your work at the museum?

13 A I work as an executive director, and I make sure that our  
14 culture and the teachings of our ancestors are preserved and  
15 taught to our younger generation. We have a cultural educational  
16 outreach to people that come through the doors. These could be  
17 people from K through 12, colleges, universities from all over  
18 the world. We've had college exchange students from China, from  
19 different countries. And we will share with them about who we  
20 are as people of the water.

21 We have shared our history with some people on the east coast  
22 of Africa. We try to be very hospitable and share who we are.

23 Q And what prepared you for your work with the museum?

24 A Years ago, when I was fishing out in the south Puget Sound  
25 region -- it was after the Judge Boldt decision, and our tribal

1 people started to return back to our area, Kamilche but also in  
2 Thurston, Mason and Kitsap counties. And many of us had not  
3 known much about our history. But when we started to come  
4 together out on the water, we would hook our boats together. It  
5 would be just like hanging on to the next boat and the next boat.  
6 And we'd share with one another our point of history, what our  
7 grandmothers or grandfathers had taught us and what we knew about  
8 the different inlets where we were fishing, and who we knew as  
9 far as who were still smoking the salmon.

10 So part of my teaching ground had to do with the return back  
11 to the south Puget Sound area and learning about our history  
12 through my relatives, many of them were elders. And that was  
13 after the Boldt decision.

14 Q Do you hold any elected positions with the tribe?

15 A Currently I'm on the tribal council.

16 Q And how long have you been a member of the tribal council?

17 A Ten years.

18 Q Are there any subject areas that you concentrate in as a  
19 tribal council member?

20 A Some of the areas that hold my interest are healthcare,  
21 education, cultural education, and also the natural resources.

22 Q Have you been involved with the environmental policy issues  
23 on the council?

24 A Yes, I have.

25 Q And what have you done in that area?

1       A    Years ago when I was fishing, during the time that fishing  
2                  was my main livelihood, it was what I did every year, and even  
3                  off-season I would be working on my gear, hanging nets. Our  
4                  fishing fluctuated. It had good years and bad years.

5                  One year it became extremely terrible, and it was during this  
6                  time that I got into my rig, my Volkswagen, and I would drive  
7                  around the res, the reservation, where our community is, our  
8                  tribal community. And I had this area that I liked to visit.  
9                  And the road that I would travel down was canopied. It was  
10                 beautiful. Well, as I made the corner and came out of the  
11                 canopy, I wasn't prepared for what was before me. The forest  
12                 that I loved so much was gone. They had taken all the trees.

13                 I was so astounded. I got out of my car and stood on the  
14                 ridge and looked around. And it was like coming across someone  
15                 who had died. And it really bothered me a lot, so much that it  
16                 impacted my daily life. And my husband at that time said, What  
17                 is wrong with you? And I told him that I was really bothered by  
18                 this. And he said, Well, what are you going to do about it? And  
19                 at that time, I thought, Well, there's nothing I can do about  
20                 this. But then as I started to think about it, yes, I am one  
21                 voice, so I went down to our natural resources. And at that time  
22                 there was a lady there who brought out these maps, and she showed  
23                 me what was going on and how that already this particular area  
24                 had been replanted. And I was glad to see that it was replanted.

25                 And she said, Charlene, I notice that you're really concerned

1 about what's going on in the land use. And I said, I am. And  
2 she said, Would you be interested in volunteering? I said, I  
3 will.

4 So what happened is I started volunteering on these watershed  
5 committees and commissions, and I utilized my years of knowledge  
6 of being out on the water, being in close contact with the  
7 environment and paying attention to the changes of the season,  
8 watching what was going on on the mainlands of the areas that we  
9 fished, and utilizing the cultural knowledge that I had gained  
10 from my ancestors about how important it is that we as people  
11 coexist on the land.

12 I used these principles in the environmental policy-making  
13 that I would be involved in with the tribe. And the  
14 environmental policy-making would be with the local government,  
15 state, and also some of the federal.

16 Q Could you describe what a rememberer is?

17 A In our tribal society, through the generations, the ancestors  
18 would watch in the community those that had a good memory for  
19 retaining history. So we know them as accountants that can look  
20 at long numbers, and they have those numbers.

21 In our culture, our people would know that there are ones  
22 that have that memory and that cared to pay attention to details  
23 of the ways of the people. And when I was younger, I remember  
24 hearing a lot of the teachings from my granddad and from my  
25 grandmother about who we are as people of the water, and then

1 from my father. And I would take time in busy days to sit with  
2 tribal elders and listen to them and make sure that -- at times I  
3 didn't like it, but I had to. Sometimes I would take notes on  
4 paper, table settings and napkins, fish tickets, clam tickets,  
5 and I stored all this information. I have some boxes of just my  
6 own personal gathering of being a rememberer and making sure that  
7 our history is held for the future.

8 Q Are you familiar with stories about salmon that would have  
9 been told within your family?

10 A Yes.

11 Q Could you describe some of those stories?

12 A The first time, I think it was back in 1978, I attended a  
13 first salmon ceremony, and I listened to some of the teachings  
14 from the elders of how the salmon would return. When they would  
15 return, our people would have this ceremony to honor the return  
16 of the salmon because they provided so much in our daily lives.

17 To our tribal people, the salmon would be like, to many  
18 non-tribal societies, their daily bread. Our salmon was an  
19 important part of -- and so -- of our daily life, our daily  
20 bread. So part of the ceremonies our people would have would be  
21 a way to honor, not just the salmon, but to honor the creator  
22 that we have these salmon for today, but also for the future.

23 Q Are you involved with the Shaker Church?

24 A I'm not a full-fledged member, but I am one that, as a child,  
25 it was a church that I went to. When I was sick, I went there a

1           lot, and they would pray over me, and I remember that.

2           I remember that we would go to tribal Shaker functions at  
3           different churches. And some of the people that I see today, I  
4           remember as a child that they also were at these functions. The  
5           Shaker Church was an important aspect of my childhood. And even  
6           today, it's still an important part of who I am.

7       Q     Could you describe what the Shaker Church is?

8       A     The Shaker Church -- in the late 1800s, a lot of the ways of  
9           my tribal people were outlawed. The ways that our people would  
10          worship and pray were considered very pagan, very heathen, and so  
11          there are many laws that prohibited tribal people from practicing  
12          their expression of religion, their belief.

13           My ancestor, John Slocum, he had a life/death experience, and  
14          part of the teaching that he brought back was to take back what  
15          we call Gwud-sah-dod in our language means body, mind, soul,  
16          spirit, infant, child, adult, elder, spring, summer, fall,  
17          winter. He took these teachings, and he knew about Protestant  
18          teachings, the Baptists and the Methodists, and then he took the  
19          teachings of Catholicism, and he combined them together, and he  
20          incorporated what is known as the Indian Shaker Church. And that  
21          was incorporated in 1910.

22           This church helped to preserve a lot of our sacred songs that  
23          we held very dear, and it also helped preserve a lot of our  
24          principles and ways that we believe how we should treat each  
25          other.

1 Q Do salmon play a role in the Shaker Church activities and  
2 functions?

3 A Normally when we have a Shaker Church gathering, there's  
4 always salmon dinners. There's probably salmon stew, there's  
5 probably fish eggs, smoked salmon, smoked fish heads. There's a  
6 lot of salmon around the -- well, salmon is one of our first  
7 foods. And so when we have these Shaker gatherings, often there  
8 will be the salmon.

9 Q Have you ever testified in court on the tribe's behalf?

10 A Yes.

11 Q And when was that?

12 A That was for the shellfish case.

13 Q And what did you -- what did you testify in that case about?

14 A I am a fisher person, but I also consume a lot of shellfish.  
15 Because of that knowledge of the ways of the ancestors, what I  
16 testified on was that knowing how the shellfish was used and is  
17 still currently used for our people.

18 Q Now, are there other ceremonies besides the Shaker Church  
19 that tribal members currently perform that involve salmon?

20 A Yes. Salmon is our first food, one of the main foods for our  
21 people. And during naming ceremonies, the time celebrating the  
22 birth of a child, or maybe it's letting go of a loved one that  
23 has passed on, it might be a time where a marriage has happened,  
24 we will have salmon. It's usually there.

25 Q What about the first salmon ceremony; could you describe

1           that?

2       A   Our tribe every year has a salmon ceremony. It is in August,  
3       July, around that time. It depends on when it's determined. And  
4       we take the first salmon, and we prepare it, and we serve it to  
5       people. We invite non-tribal people to also join us. It is to  
6       be like a ceremony to thank the creator for this gift of the  
7       salmon.

8           We also utilize it as a time to help people -- to remind  
9       people that we coexist. Whatever happens to that salmon will  
10      happen to us as humans.

11      Q   Now, at the museum, are there artifacts that you've collected  
12      that reflect the historic role of salmon in Squaxin culture?

13      A   Yes.

14      Q   Could you describe some of those?

15      A   I sure can. Just recently some of our projectile points,  
16      which would be items that could have been used for salmon use,  
17      have been dated several thousands of years old. We have a whale  
18      bone club that's in the museum that is called a salmon club. And  
19      that's dated 2,500 years old. We have a gill net that was  
20      brought out of our archeological site, and that is dated close to  
21      500 years old.

22           We have fish rearers. They're like -- I would say kind of  
23      like fish pens that help guide the salmon, so our ancestors would  
24      gather the salmon and prepare them for the winter. We have  
25      remnants of fish rearers. We have legends on our seven-panels

1       that is the length of the museum. And we cover the stories of  
2       salmon and how it's important for us to be very mindful that we  
3       coexist on the land, as part of our teachings.

4       Q      Now, could you describe in more detail those panels you  
5       mentioned and their meaning at the museum?

6       A      Our seven panels represent the seven inlets from where our  
7       tribal people come from, the ancestral inlets. And on each of  
8       the panels, we have portions of the legend. It's called the  
9       Do-kwee-buhth. It's the Legend of the Changer. On each panel  
10      there is stories that tell about us as people of the water. And  
11      they're important stories to Squaxins but also to tribes in the  
12      Northwest.

13           And on these panels, I would say the second one tells about  
14      how there was a great earthquake on the Deschutes River and how  
15      Changer came and caused the ground to rumble and shake, and it  
16      changed the course of that river so that now there were falls,  
17      and how that the salmon at one time had been able to go up  
18      those -- this river no longer could go up that river, so they had  
19      to go to different streams and creeks.

20           In our teaching of Gwud-sah-dod, it teaches us that the  
21      reason this happened is because some of the protocol that was  
22      important for this world had not been followed, and so in that  
23      particular panel, we're telling about the importance of -- that  
24      we should always pay attention to what we are doing to the land  
25      and always be careful, that we as humans, we're just a small part

1       of what is happening with the land.

2           The second one was on the -- it's a story about Changer, and  
3       it tells a little bit more about how the salmon is one of the  
4       first foods that was given to the people as the foods.

5       Q     Let me ask another question. Are salmon parts used in  
6       contemporary art?

7       A     Yes. I forgot to mention something, and this is tied to the  
8       art question. In our museum, we have a petroglyph. A petroglyph  
9       is a rock with carvings into the rock. Some of these rocks that  
10      we have in our museum are several thousands of years old.

11           In a couple of the rocks, there are depictions of salmon.  
12          And a lot -- so it shows the antiquity of how important salmon is  
13       to our people. In the modern artwork, it's still a depiction of  
14       that our people are very much tied to the salmon. Many of our  
15       people believe that salmon are like spirit helpers. If you ever  
16       watch salmon, you can see why, because they go through a lot, and  
17       they still make their destination. They have that determination  
18       to make that destination.

19       Q     I think you testified earlier that you used to fish yourself  
20       quite a bit?

21       A     Yes.

22       Q     Could you describe your fishing experience?

23       A     I've been fishing since 1976, I think it is. '75 or '76.  
24          And I love the water. I love the good weather and the bad  
25       weather and the cold weather and the warm weather. It's very

1 exhilarating to be out there on the water, to be -- it's like  
2 being alive to sometimes get so wet from fishing. It's a good  
3 place to connect with your tribal people, I think. Because it  
4 is, for our tribe, almost like a family affair. Even though we  
5 may not be related to maybe the Peters clan by blood, we're still  
6 family because we are all out there fishing.

7 There's a great importance to us as tribal people to be able  
8 to be out there in the areas where we know that our ancestors  
9 have been and to know that we're doing the same things that our  
10 people have been doing for thousands of years: catching those  
11 salmon and feeding our people.

12 So my experience on the water covered many years. I also  
13 almost gave birth to my first daughter. She's 29 this year.  
14 Shows you how much I was out there on the water. I also noticed  
15 a lot of changes all these years of what's been happening out on  
16 the water. I fished different species of salmon using different  
17 gears.

18 Q I'm going to show you a photograph here just for illustrative  
19 purposes, if I can figure out how to make the equipment work.

20 A Do you recognize this photograph?

21 A Yes.

22 Q Can you describe it?

23 A This is a photograph of my grandfather, Michael Krise. And  
24 my grandfather has lived in Kamilche all his life. And this was  
25 taken by Little Skookum. And this area is Kamilche. My

1 grandfather was an avid fisher person. He was always smoking  
2 salmon.

3 When we stayed at our grandfather's house, it would be salmon  
4 eggs for breakfast, it would be salmon sandwiches for lunch, it  
5 would be smoked salmon with potatoes for dinner. So whenever I  
6 see a photo of my grandfather, I always think of salmon.

7 Q Could you tell us when this photograph was taken?

8 A In the 1960s.

9 Q Was he concerned about the abundance of salmon?

10 A He was. In the 1960s, my brothers would have to go down to  
11 the creek with him, and he would have them egg salmon -- milk the  
12 salmon. And my brothers would tell about how he was so concerned  
13 that the salmon were not returning like they used to. In his  
14 time, the streams and creeks were full of salmon, and now it  
15 seemed like they were diminishing rapidly.

16 Q Now, did your fishing effort ever change over time? I think  
17 you indicated earlier you used to be out on the water a lot. But  
18 at some point in time, did that shift?

19 A As I became older, yes, it did shift considerably. Fishing  
20 is not an easy way of life. I would be jumping off the bow of  
21 skiffs and jumping on rocks and pulling anchors, throwing  
22 anchors, and pulling on beach seines. I know what it's like to  
23 tear tendons, and I know what it's like to get backaches,  
24 shoulder aches, muscle aches. And plus being a mother of four,  
25 it was -- you know, it was kind of rough at times because I would

1 take my children out there too, and then juggling, making sure  
2 that my children were in school.

3 But I think the biggest factor was -- that totally changed my  
4 world was those bad years and not being able to make it through  
5 the year, and the struggle, and almost like a shame not being  
6 able to put the food on the table when I wanted to or not being  
7 able to buy the school clothes, you know, because I depended on  
8 fishing.

9 So, yes, after a while when it became so bad, I became the  
10 environmental policy representative. And I still fish off and  
11 on, but not as much as I used to because I could not make it in  
12 that area.

13 Q Now, in the bad years, how were other people in your family  
14 impacted by the lack of salmon?

15 A I've watched where there were times when I would see the  
16 children at the bus stop, and some of them would just have their  
17 heads down, and I'd look and see, this was a bad year, because  
18 the kids did not have brand-new shoes, they did not have the  
19 school clothes. So that was probably one of the bigger areas  
20 that, as a mother, I would see in the children.

21 But one year it was so bad that I watched as cars were being  
22 repossessed, and people would talk about their eviction notices  
23 or losing electricity. And it was because we all depended on  
24 that salmon to return. And we'd get the paper numbers, like, oh,  
25 you're supposed to get this amount. But then when it came to

1 actualities, sometimes those salmon would not be there. And it  
2 wasn't because we lacked the effort. We were putting everything  
3 into it to try to get our share, but it was not there.

4 Q Now, the changes in abundance, does that affect the cultural  
5 practices in any way?

6 A There were times when we needed salmon for certain  
7 ceremonies, and we were worried because we could not get the  
8 salmon for those ceremonies. What we would do to -- when we  
9 couldn't get the fresh salmon, is we would bring out our smoked  
10 salmon and our canned salmon and utilize that salmon.

11 MR. DAVIES: I don't have any other questions.

12 THE COURT: Thank you.

13 Cross-examination.

14 CROSS-EXAMINATION

15 By Mr. Tomisser:

16 Q Good morning.

17 A Good morning.

18 Q We had an opportunity to meet a few months ago, if you  
19 recall, when I had a chance to ask you some questions at that  
20 time.

21 Do you remember that?

22 A Yes, I do.

23 Q I will start and ask you a little bit more about the work  
24 that you do as a council member. Is it correct with the Squaxin  
25 Tribe, it is the council that makes policy decisions for the

1 tribe based on the income that the council gets from its members?

2 A We have a general council. The general council is our tribal  
3 people who are 19-year-olds and on up. And we take their  
4 directive, their ideas, what they would like to see for the  
5 future, and we follow many -- and often what they have stated as  
6 the needs, and then we also follow our Constitution.

7 Q And specifically on the council, what is your position?

8 A I would be considered a council member at large.

9 Q And you have been on the council for about ten years; is that  
10 right?

11 A Yes.

12 Q And the council every year formulates the budget for the  
13 tribe; is that correct?

14 A Actually, we have a budget commission that will put together  
15 and gather all the information regarding what is going on within  
16 the tribe.

17 Q And how does that commission interact with the council?

18 A They will give a report towards the end.

19 Q And so when the council is looking at all the things that  
20 need to be done on behalf of the tribe, can you give the Court a  
21 list of the various services that the tribe provides to its  
22 members?

23 A I will do my best. I don't know if I could cover them all,  
24 because it is quite large.

25 Some of the major ones would be, of course, our healthcare,

1       natural resources, education, law enforcement, cultural  
2       education, our elders program, our social service program.

3       Q     It sounds like you have a number of programs that are devoted  
4       to the health and wellbeing of the tribal members from very young  
5       all the way through to the elder members of the tribe. Would  
6       that be true?

7       A     Yes.

8       Q     And every year when these services are being provided, you  
9       have to have a budget to pay for them; is that right?

10      A     Yes.

11      Q     And is it true that there is not enough budget to pay for all  
12       the things the tribe would like to do for its members?

13      A     There is not enough. There really isn't. And we do actively  
14       seek grants, and we go after grants to try to help offset those  
15       costs.

16      Q     Sure. And when the tribe is looking at doing what it can,  
17       the tribe is then required to prioritize the budget; is that  
18       correct?

19      A     Yes.

20      Q     I want to ask you a little bit also about fishing and your  
21       experience with fishing. If I recall correctly from what you  
22       told me before, fishing over your time has fluctuated up and  
23       down, some years better than others; is that true?

24      A     Yes.

25      Q     But to the best of your memory, the effort of the Squaxin

1       **Tribe to fish has always been good; is that right?**

2       A     It has been good. There have been times when the fishing has  
3            been extremely bad, and we'll see a diminution in effort.

4       Q     Is it your impression, though, that over the years, the  
5            number of fishermen has remained relatively constant?

6       A     In the past years, it has been larger, the effort.

7       Q     Is it also correct, Ms. Krise, that personally, though, you  
8            are unaware of any culvert barriers in the Squaxin Tribe; is that  
9            correct?

10      A     Well, are you -- the Squaxin Tribe reservation?

11      Q     Yes. Do you know of any, is the question.

12      A     On our reservation?

13      Q     Yes.

14      A     No.

15      Q     One final question. The picture here of your grandfather, I  
16            was just curious if there was perhaps a misdating on the  
17            photograph. It looks like it says August of 1966.

18           Do you see that?

19      A     Yes, I do see that.

20      Q     But there is snow on the ground?

21      A     It might be a misdating, huh? Not unless -- no. This is  
22            just me, because I'm from a tribal reservation. We have dogs.  
23            You know, I have a wild -- not a wild dog, but a dog that likes  
24            to tear up everything.

25           I don't know. But I'm looking at the trees, too. In August,

1 you would think that there would be leaves on those trees, so it  
2 looks misdated.

3 Q But at any rate, it is your grandfather?

4 A It is my grandfather.

5 Q There with the fish that he caught?

6 A Yeah.

This is what could have happened, is that the photo could have been taken earlier in the year, and then it was probably printed about that time.

10 MR. TOMISSE: Thank you.

11 THE WITNESS: You're welcome.

THE COURT: Any redirect, Mr. Davies?

13 | MR. DAVIES: None, your Honor.

14 | THE COURT: You may step down.

15 | THE WITNESS: Thank you.

THE COURT: The plaintiffs may call their next witness.

17 MS. FOSTER: Your Honor, at this time the plaintiffs  
18 would call Lorraine Loomis to the stand.

19 THE COURT: Ms. Loomis, good morning. If I could have  
20 you stand and raise your right hand to be sworn in.

21 Whereupon,

22 | LORRAINE LOOMIS

23 Called as a witness, having been first duly sworn, was examined  
24 and testified as follows:

THE CLERK: Could you please state your name for the

1 record and spell it for our court reporter.

2 THE WITNESS: My English name is Lorraine Loomis.

3 L-O-R-R-A-I-N-E, Loomis, L-O-O-M-I-S. And my Indian name is  
4 Itakbix, and Alix will give you that spelling.

5 MS. FOSTER: Your Honor, I have provided a copy of the  
6 spelling to the court reporter.

7 THE COURT: Thank you very much. You may inquire.

8 DIRECT EXAMINATION

9 By Ms. Foster:

10 Q Ms. Loomis, where do you reside?

11 A On the Swinomish reservation.

12 Q Are you an enrolled member of the Swinomish Indian tribal  
13 community?

14 A Yes, I am.

15 Q Were you born and raised on the reservation?

16 A Yes, I was born and raised on the Swinomish reservation.

17 Q And have you lived there most of your life?

18 A I lived there -- I was gone for a period of about ten years,  
19 and then I came back.

20 Q Are you descended from anyone who has signed the Treaty of  
21 Point Elliott?

22 A Yes, I am. On my mother's side, her great grandfather, his  
23 name is Kwallattum. He is also known as General Pierce, and he  
24 is the subchief of the Skagit Tribe, which signed the treaty.

25 And on my father's side, his great grandmother is a

1 granddaughter of Chief Goliah, who is also a Skagit Tribe chief,  
2 and he signed the treaty. And on still my dad's side, on his  
3 mother's side is a descendent of Chief Galilahi from Suquamish.

4 Q Was that Chief Galilahi from Suquamish?

5 A No. Chief Seattle, Chief Sealth.

6 Q Are you familiar with the history and traditions of the  
7 Swinomish Tribe?

8 A Yes, I am.

9 Q And how did you gain this familiarity?

10 A It was handed down. It was taught from generation to  
11 generation, and we lived it. We lived the culture of the  
12 reservation.

13 Q What role did your family and tribal elders have in passing  
14 down traditions to you, if any?

15 A It was always very important for tribal members to listen to  
16 elders, and listen -- and they always spoke with teachings in all  
17 of the doings which we attended. And they were always teaching  
18 something about the tribal culture, what to do and not to do.  
19 You were always taught to listen.

20 Q And can you share with us one of those traditions, please?

21 A One of the traditions, I guess, since we are talking about  
22 salmon and wildlife -- or not talking about wildlife. One of our  
23 traditions is that when fishermen go out on their first day of  
24 fishing, they come home, and they share their salmon with elders  
25 of the reservation, always with elders of the reservation, and it

1       could be their family elders or it could be other elders.

2           And when a young youth, when they go out hunting and they  
3       catch their first deer or their first elk or they shoot their  
4       first deer, they give it all away. They don't keep any of it.  
5       They give it all away.

6       Q     Were you taught the importance of community by your elders?

7       A     Yes. Yes, I was. Community gatherings, it was important for  
8       everybody to attend community gatherings, to be there to -- just  
9       to be there at the community gatherings.

10      Q     Are you currently employed, Ms. Loomis?

11      A     Yes, I am.

12      Q     And where are you employed?

13      A     I am employed at the Swinomish Tribe.

14      Q     And what is your position there?

15      A     Fisheries manager.

16      Q     And how long have you held that position?

17      A     Since 1975.

18      Q     And what are your major responsibilities as a fisheries  
19       manager?

20      A     We do a lot of negotiations. I represent the tribe in policy  
21       matters with other tribes, the state, feds, and anything that has  
22       to do with salmon.

23           I do preseason management plans for all of the species that  
24       we fish in. I open and close fisheries and meet with our  
25       governing body and our fish and wildlife commission on all of

1       these.

2       Q     When you have to make decisions in your job as a fisheries  
3           manager, what kinds of issues do you take into account?

4       A     Well, I always make sure that what is this decision going to  
5           harm in the future, that this decision is not going to take away  
6           fish that is to come back in the future or anything else. We  
7           always have to look forward. We always got to make decisions to  
8           protect the fishing rights of the tribe and keep the culture  
9           going for the tribe.

10      Q     Overall, do you find that your job is a rewarding job?

11      A     Yes, it is rewarding. It is hard to say right now why it  
12           would be rewarding. But you know, to work for the tribe and work  
13           for fishermen is -- and to see fishermen on the first day that we  
14           have an opening of any kind, and they're scurrying around the  
15           docks, they're getting ready. My office, by the way, faces the  
16           docks, so I can see them all going.

17           And to see them getting ready and how excited they are to be  
18           out, to be able to go out fishing is a rewarding experience. To  
19           see them happy after a season that -- they have had a good  
20           season, it's -- fishermen in general, you know, if they're happy,  
21           I'm happy.

22      Q     Have you held any elected positions with the Swinomish Tribe?

23      A     Yes, I have.

24      Q     What position is that?

25      A     I served on the senate, our governing body, for about 15

1       years. I am not on it now.

2       Q     Do you represent the tribe on any fisheries boards or fish  
3           commissions?

4       A     I am on the board of the Skagit System Cooperative Board.  
5           The Skagit System River -- Cooperative, SRSC. That's a  
6           consortium that manages the fisheries for the two tribes, the  
7           Sauk-Suiattle Tribe and Swinomish Tribe. We have a staff of  
8           probably about 20 scientists and maybe a technician -- counting  
9           the technicians, it would be about 27.

10          I also serve on the commission for the Northwest Indian  
11           Fisheries Commission, which is a coordinating body for the 20  
12           tribes in Puget Sound and the coast. I serve as vice chair in  
13           that position. And I also serve on the Fraser Panel for the  
14           Pacific Salmon Commission.

15          Q     And do you hold a particular position on the Fraser panel?

16          A     I am presently this year currently the chair for the U.S.

17          Q     Is that the U.S. section?

18          A     Yes.

19          Q     Do you hold any positions with regard to a fisheries  
20           management process known as North of Falcon?

21          A     As the vice chair of the Northwest Indian Fishing Commission,  
22           I serve as co-chair with WDFW in that process.

23          Q     And would you explain briefly to the Court what North of  
24           Falcon is, please?

25          A     It is a process that takes about three months or longer, to

1 put it in very few words.

2 THE COURT: The explanation doesn't take three months,  
3 right?

4 THE WITNESS: No.

5 It's a co-managers body that we put preseason plans together  
6 from the ocean to all of the river systems. So all of the tribes  
7 are involved and Washington Department of Fisheries. And we put  
8 harvest management plans together.

9 By Ms. Foster:

10 Q Thank you. Did you serve on the board of directors for  
11 Shared Strategy for Puget Sound?

12 A I did.

13 Q Growing up, Ms. Loomis, did you or anyone else in your family  
14 fish for salmon?

15 A All of my family fished. My mother, who was born in 1903,  
16 and she was 93 when she died, or 94, she used to tell us about  
17 going out on a family canoe with her uncle, as a child, to the --  
18 going through Deception Pass and going to the San Juans to fish.

19 On my birth certificate, on my father's occupation, it says  
20 "fisherman." Fishing was just handed down from generation to  
21 generation and still continues today.

22 Q So do you have family members that today are fishing for  
23 salmon?

24 A I do. I have -- just about all of my family fishes.

25 Q How old were you when you began to fish for salmon?

1 A Well, I was a helper in the beach, seining as a little girl.  
2 I did anything and everything to stay at the beach, seining,  
3 fishing.

4 Q Would you describe for the Court what beach seining is?

5 A Beach seining is on our reservation. It takes about 10, 12  
6 people that fish a net that is -- it's stationary on the beach  
7 side, and then the net is pulled around the water and held for  
8 anywhere from 17 to 20 minutes, and then it's brought in. The  
9 other side is brought in to shore, and then it's pulled in by  
10 hand. And it's always families, families that run a beach seine.

11 And so the community, everybody, you know, comes down to  
12 visit. So it's like an everyday community affair. It's just a  
13 wonderful time to be out. In fact, I spent -- every day after  
14 work, I went down this summer to my grandson, who's still beach  
15 seining today.

16 Q Do you currently fish for salmon yourself?

17 A No. I have a boat. It doesn't fish for salmon. It fishes  
18 for shellfish right now. But yeah, I've had a boat since 1978.

19 Q And why is it that you don't fish for salmon now?

20 A It takes a lot more money to fish for salmon, especially in  
21 the marine waters. And the salmon are not plentiful enough to  
22 pay for your gear and your -- you know, to really -- even to  
23 really break even. So we have quit. We don't fish salmon  
24 anymore.

25 Q If salmon were more plentiful, would you fish?

1 A Oh, yes. Yes.

2 Q Where do the members of the Swinomish Tribe currently fish  
3 for salmon?

4 A Mostly in the Skagit River and the Skagit Bay area.

5 Q Approximately how many tribal members does the Swinomish  
6 Tribe have at the present time?

7 A About 800.

8 Q And in recent years, approximately how many tribal members  
9 fish commercially for salmon?

10 A About 100.

11 Q And do other tribal members fish for other species?

12 A Yes.

13 Q And what species would those be?

14 A Shellfish. And we have about -- between 5- and 600 people  
15 that fish.

16 Q And when you first became fisheries manager, did tribal  
17 members harvest more salmon or more shellfish?

18 A More salmon.

19 Q And do you know why so many tribal members now harvest  
20 shellfish?

21 A They can't make it in salmon anymore. They can't -- there  
22 isn't enough salmon to go around, to sustain them in a  
23 livelihood.

24 Q Do you believe that if there was more salmon to be harvested,  
25 that those members would, once again, return and fish for salmon,

1           those who are not currently fishing for salmon?

2           MR. TOMISSER: I would object, your Honor, to  
3           speculation for this witness.

4           THE COURT: The objection to speculation would be  
5           overruled.

6           By Ms. Foster:

7           Q     You may answer.

8           A     Thank you.

9           Yes, I do believe that. In fact, I know it would be -- it  
10          would happen. I will give you an example of what happens in the  
11          rivers. When we have a run that is forecasted -- it's not  
12          forecasted for very much, and we have maybe six to ten boats that  
13          will go out, but the forecast is really -- was really more than  
14          what it forecast, the abundance is more than what it was  
15          forecasted, then you will see anywhere from -- that number  
16          increase to anywhere from 25 to 30 boats, that everybody will go  
17          out and they will fish. They absolutely look for that  
18          opportunity to go out there.

19          Q     Approximately how many tribal members currently fish for  
20          salmon on a subsistence basis?

21          A     All my boats that fish for -- that fish salmon will fish  
22          subsistence. Number one, as our culture is, is that they bring  
23          in -- their first catch, they will give away. They will give it  
24          to seniors. And always -- you know, part of what happens with  
25          our culture is that Indian fishermen will -- Indians are very

1 giving. They will give -- provide fish for their aunts and  
2 uncles, grandparents, grandpas and to -- so that they will have  
3 fish to freeze, fish to can, fish to be able to save for the  
4 wintertime. And so everybody that does subsistence -- everybody  
5 that fishes will bring fish home.

6 Q Are there members of the Swinomish Tribe now who don't fish  
7 commercially for salmon, but fish on a subsistence basis?

8 A I know of a couple. You know, maybe they're too old, they  
9 can't go out and commercially fish anymore, but they just want to  
10 get out on the water, so they will go out and they'll fish for a  
11 few fish and bring it home. Or maybe they have another job and  
12 they want to get out on the water, so they'll go out on weekends.  
13 If it's open on a weekend, they will go out.

14 Q Does the tribe also have ceremonial fisheries?

15 A Yes, we do.

16 Q And on which species does the tribe conduct ceremonial  
17 fisheries?

18 A We do probably on Baker River Sockeye. Sometimes there's  
19 just not enough coming in, and the Fish Commission, the governing  
20 body, will say -- you know, rather than have a commercial  
21 harvest, they will save that fish for ceremonial.

22 And sometimes on Fraser Sockeye -- at least always on Fraser  
23 Sockeye, where the tribes are allowed to go out and do  
24 ceremonials. It's important, and it's sacred to the tribes and  
25 recognized by the State.

1 Q Would you describe for the Court how the tribe conducts its  
2 ceremonial fisheries?

3 A Usually it's volunteer. You know, a fisherman will  
4 volunteer, and the tribe will pay for the fuel. But sometimes we  
5 have to pay somebody to go out there. But most of the time, it's  
6 volunteer.

7 Q Does salmon play a role in any tribal ceremonies?

8 A We do -- we have our first salmon ceremony that it's  
9 traditional to have fresh salmon on that day. And that first  
10 salmon ceremony is conducted before we start fishing. It's to  
11 bless fishermen, to bless the boats and their gear, and to -- for  
12 a safe and a good season.

13 And it's also to return the Skagit Chinook back to the waters  
14 in the four directions. And it's taken out by boats to return it  
15 back to the waters.

16 Q And have you had occasion in years past or presently where  
17 the tribe has not had enough salmon to provide for this ceremony?

18 A For the last several years, we have not had enough salmon for  
19 the ceremony, so we've had to go out and buy it from a fishery  
20 that was open, like Columbia River. But the salmon that we  
21 return to the waters was always from the Skagit.

22 Q And it always had to be fresh?

23 A Yeah.

24 Q What other ceremonies does salmon play a role in?

25 A You know, all of our tribal gatherings, it's always been

1 known for the table to have salmon, and it would be for the main  
2 meal.

3 We haven't -- there's been years when -- we usually put  
4 salmon away to have for these different gatherings and to provide  
5 fish for everybody for all year, for the different namings,  
6 birthdays, weddings. It could be religious. It could be --  
7 anytime it's a gathering of people, when it's a community  
8 gathering, we provide them fish.

9 There are some years we haven't been able to do that. When I  
10 sit around the table with other members of the tribe, and we're  
11 sitting there, I can hear people say when they start putting the  
12 food on the table -- it's always served family style. And when  
13 they start putting the food on the table and then they see fish  
14 coming in, they said, Oh, we get fish. You know, they're all  
15 excited. They're all excited. Because that's what used to  
16 happen. We never had to save fish. When we had a gathering, we  
17 could go out, we could fish, we could bring it in, we could serve  
18 it.

19 That doesn't happen anymore. We now have to put our fish  
20 away in the cold storage to save for the various community  
21 dinners, and sometimes we can't provide for all. It's sad when  
22 we have to say no, we don't have any fish left.

23 Q Why is it so important to have salmon at these ceremonies?

24 A It's always been. It's just -- I've never known community  
25 dinners without salmon when I was growing up, and so it's been

1 handed down, you know, from generation to generation again.

2 And I guess when you look at, you know, how important it was  
3 for our ancestors who signed the treaty, you know, how important  
4 it was for them to protect and save salmon. And that's how it  
5 is. It's just handed down from generation to generation that,  
6 you know, salmon and wild game is on the table.

7 Q Does salmon have a significance other than food at these  
8 ceremonies?

9 A I'm not understanding that question. I'm sorry.

10 Q I understand from what you're saying that salmon is important  
11 to serve as food at the various tribal ceremonies. But what I'm  
12 wondering about is whether or not -- why it is so essential that  
13 it be salmon as opposed to some other.

14 A It's -- I think it's seafood. You know, it isn't a matter  
15 of -- all seafood and wild and -- I guess because, you know, the  
16 one thing that the reservation wanted when the Indian people were  
17 put on reservations, the one thing they wanted, they wanted to be  
18 put in the mouths of the rivers, on the rivers, by bodies of  
19 water because salmon was so important.

20 I can't express to you any other way, you know, to put into  
21 words why or how. But that's the way it was handed down from way  
22 back. That's what we were taught.

23 Q Now, you made reference earlier to SRSC, which as I  
24 understand your testimony, is a consortium of two tribes, the  
25 Sauk-Suiattle and the Swinomish Tribe.

1       Are both of those tribes located on the Skagit River -- the  
2 tributaries to the Skagit River?

3       A     The Swinomish is located on the mouth of the river, and the  
4 Sauk-Suiattle is quite a ways up the river.

5       Q     And when was the cooperative formed?

6       A     1975.

7       Q     And where is it located?

8       A     It is on the Swinomish Tribe.

9       Q     On the reservation?

10      A     On the reservation.

11      Q     You mentioned earlier that you thought there were about 20  
12 scientists employed by the cooperative. What is the focus of  
13 those scientists?

14      A     We do restoration, research, environment, harvest. We study  
15 all of those and restore salmon.

16      Q     And what species of fish do they -- and when I say "fish," I  
17 guess what I'm trying to find out, do they work on salmon issues  
18 or do they work on salmon and shellfish issues, or do they work  
19 on shellfish issues?

20      A     They work only on salmon.

21      Q     Are the scientists that are on -- that are employed by the  
22 cooperative, are they members of any technical committees or  
23 commissions that you are aware of?

24      A     Yes. They serve on quite a few, actually. We have a harvest  
25 biologist that serves on the Pacific Salmon Commission, Coho

1       Technical Committee. We have two of them that serve on TRT,  
2       technical review team, for NOAA, for ESA, for -- one on  
3       Steelhead, one on research. And I am not sure about the others.  
4       I know there's others.

5       Q      Now, you have mentioned the cooperative, but what I would now  
6       like to know is whether or not the tribe has staff itself that  
7       address reservation fisheries and natural resource issues.

8       A      In the tribe's planning department, they have some  
9       scientists. They do reservation, forest -- forest and fish,  
10      water quality surveys. They do some construction, some  
11      restoration work.

12      Q      Does the tribe operate a fish plant on the reservation?

13      A      Yes, they do.

14      Q      And would you tell us when that was established?

15      A      It was actually established back in 1969, I believe. And  
16      we -- but in 1975, we got out of the fish processing, and we  
17      leased our plant out, but we just got it back this year.

18      Q      Does the tribe support salmon recovery and restoration?

19      A      Yes, it does.

20      Q      Does the tribe participate in WDFW to address harvest issues?

21      A      Yes.

22      Q      Could you explain that, please?

23      A      Well, in our North of Falcon process, with our preseason  
24      planning -- I am not sure what you are getting at. You asked  
25      about harvest, right?

1 Q Yes.

2 A In our North of Falcon process, we work towards protecting  
3 the resource and development plans that we both agree on.

4 Q Has the tribe completed any projects on the reservation to  
5 protect or restore salmon?

6 A Yes.

7 Q Would you describe for the Court some of those projects,  
8 please?

9 A We have one tide gate. We put in a self-regulating tide gate  
10 on Fornsby Creek and a culvert further up. And we put in a  
11 bridge and a culvert, I believe, on Lone Tree. I'm not sure of  
12 the name of the creek, but it is on Lone Tree. I'm not sure of  
13 the name of the creek.

14 Q And when you say that the tribe has installed a culvert, was  
15 that to ensure fish passage because there had not previously been  
16 fish passage?

17 A Yes.

18 Q Has the tribe participated in or completed off-reservation  
19 projects to protect or restore salmon?

20 A Yes, we have.

21 Q Would you describe for the Court some of those? I know you  
22 may not be able to remember many of them, but if you could  
23 describe some of them for the Court, that would be helpful.

24 A I don't remember the names of the creeks, but I know there  
25 have been culverts that we worked with the County and with the

1 State. We've always worked with the State. And to fix culverts  
2 that -- I guess I better not say exactly, but they were culverts.

3 We worked with the Forest Service board to either  
4 decommission roads or fix them. As many people as we could work  
5 with, we worked with. And it's important to work with others to  
6 fix the problems with habitat.

7 Q And has the tribe participated or sponsored or, I should say,  
8 been involved with any projects in the Skagit estuary?

9 A Yes.

10 Q And what are those projects?

11 A We opened up dikes and made estuaries and flooded it with  
12 water. I don't know. I don't know the names of them. I can't  
13 remember.

14 Q Does the tribe receive any income from fishing?

15 A Yes.

16 Q And would you describe for the Court how that occurs?

17 A For each fisherman that fishes commercially, they are charged  
18 with a five percent tax, and the tribe -- the fisheries office  
19 collects all that. And on December 15th, a two percent tax is  
20 returned back to the fisherman. It is for them to use for  
21 Christmas; for them to use for groceries or whatever their needs  
22 might be. It is returned back to them.

23 And this year, in 2009, because the seasons have been so bad  
24 that we had to -- we returned the three percent to them in May  
25 this year. We returned the two percent in December, and then in

1       May we returned the -- for them to use to get started for  
2       fishing.

3       Q     Was that unusual, that you would have returned the three  
4       percent?

5       A     This was the first time.

6       Q     Now, I'd like to just talk a little bit about how fishing has  
7       changed since you've been a fisheries manager.

8               THE COURT: Counsel, if we're going to get into a  
9       different area, let's go ahead and break for lunch. Let's try to  
10      start up at 1:20. Will that work for everybody? Okay. Twenty  
11      minutes after one. We'll be at recess.

12     (At this time a lunch break was taken.)

13               THE COURT: All right. Counsel, we're ready to start  
14      our afternoon session.

15               Ms. Foster, I believe you were still on direct with Ms.  
16      Loomis.

17               MS. FOSTER: Yes, I was. Thank you, your Honor.

18      By Ms. Foster:

19       Q     Ms. Loomis, before we went to lunch, I believe you mentioned  
20      one of the ceremonies that I think might behoove us to just talk  
21      about a little more. You mentioned a naming ceremony.

22               Would you describe for the Court what a naming ceremony is,  
23      please?

24       A     A naming ceremony is a -- it's a tradition, of course. And  
25      it's a big doings, a big gathering. It's where a person will

1 receive an Indian name that is handed down from generation to  
2 generation. Like my name, Itakbix, is my grandmother's name.  
3 And it's a -- the people come there to learn your name and call  
4 you that name. And for most cases, instead of calling you by  
5 your English name, they will call you by your Indian name.

6 Some people believe that the youth are able to receive names.  
7 And that's their tradition. That's their family way of doing  
8 things. My mother felt that you have to earn your Indian name.  
9 You have to have proven yourself in your Indian culture to be  
10 able to have an Indian name. And if you proceed on in life and  
11 you don't honor that name and you're somehow doing something that  
12 is not -- that the elders do not like, then they can take that  
13 name away from you.

14 And, again, that's a big ceremony as well, taking the name  
15 away, and so that people will know that that name no longer  
16 belongs to you.

17 Q Thank you very much.

18 Turning your attention now to the fisheries of the Swinomish  
19 Tribe. What wild salmon runs return to the Skagit River?

20 A We have spring Chinook, Mt. Baker Sockeye, summer, fall  
21 Chinook, Coho, Pinks, Chum, Steelhead.

22 Q Historically, did the Swinomish Tribe fish each of those  
23 runs, or were there some runs that the tribe did not fish?

24 A No. Historically we fished all those runs, yes.

25 Q Does the tribe currently fish each of those runs every year?

1 A No. It depends on the abundance of the run coming in,  
2 whether it is depressed or not depressed.

3 Q Are any of the stocks, to your knowledge, that return to the  
4 Skagit River listed under the federal Endangered Species Act?

5 A The Chinook and Steelhead are.

6 Q How do the fisheries on the Skagit, how are they managed?

7 A Well, we manage for wild stocks. If, for instance, the  
8 Chinook is coming in below escapement or coming in with few  
9 harvestable amounts, they have to be taking a count. When you're  
10 fishing Cohos or Pinks, they're the next two runs coming in and  
11 -- so you'll take Chinook incidentally to one or both of those  
12 fisheries. And so they have to be taken in a count.

13 So if you catch too much of the Chinook, you have a projected  
14 amount preseason, that's what you do in North of Falcon, with the  
15 co-managers, you project how many fish are going to be taken into  
16 your fishery. If you take too many, then it will close your  
17 fishery down.

18 Q And when you say "it will close your fishery down," which  
19 fisheries will it close down?

20 A Depending on which one you're fishing, if you're fishing  
21 Cohos or you're fishing Pinks. You -- when you're fishing a  
22 directed fishery of any one and your incidental catch is high,  
23 then it can close you down.

24 Q Other than closing your fishery down, are there other ways in  
25 which the tribe has shaped its fisheries to avoid the taking of

1 listed species?

2 A Yes. In the rivers, you can use mesh size, a minimum or  
3 maximum mesh size. Like for Chinook, you would use a six and a  
4 quarter or six inch, so you don't catch so much Chinook. It  
5 lowers the catch of Chinook.

6 Some areas, you have to close. Like 6A West Beach is one of  
7 our usual and accustomed fishing areas that we haven't fished  
8 since the early '80s because of Chinook and Steelhead. So, yeah.  
9 So there's area closures as well.

10 Q Does it affect the number of days that the tribe might be  
11 fishing?

12 A Most definitely.

13 Q Could you describe that, please?

14 A If you -- you can -- you need to limit the number of days to  
15 the number of incidental catch you catch of other species. So  
16 maybe you want to spread out your fleet or your fishing days from  
17 week to week, and maybe you want to keep your fleet fishing for  
18 three weeks, say. But in order to keep it three weeks, instead  
19 of fishing three days, you maybe fish only one day. It will  
20 limit the number of days you fish.

21 Q So, in other words, I think I heard you say that you fish one  
22 day every week for three weeks or three days in one week?

23 A Yes.

24 Q Could you please describe for the Court the general trend  
25 that you've seen in terms of the Swinomish Tribe's fisheries

1 since the Boldt decision --

2 A In the...

3 Q -- with regard to salmon fisheries?

4 A The trend has gone down. It was up in the late '70s and the  
5 early '80s. And for some stocks, it's gone way down. And  
6 lately, they're all pretty much going down.

7 Chinook was good last year -- or this year, I'm sorry.

8 Q Do you have any idea why that might be?

9 A It could be a number of reasons. It could be the work that  
10 we're doing in restoration. It could be the U.S./Canada new  
11 Chinook agreement. It could be -- it is definitely not where we  
12 need it to be. I think we have to -- we have to --

13 No, forget that. Thanks. That's all.

14 Q You have described that the fisheries of the Swinomish Tribe  
15 have decreased over time. Can you tell us how that impacted the  
16 community, the tribal members?

17 A It's decreased both in marine water fisheries, which is  
18 the -- where our bigger boats fish, and it has also decreased in  
19 the river fisheries as well. What happens in that time, we can  
20 no longer just fish. We can no longer -- most of the time, the  
21 fishers will have to get a winter job, for instance. It is no  
22 longer just -- fishing is no longer what we can sustain ourselves  
23 with.

24 Q And has the tribe sought to help the fishermen out in any  
25 way?

1 A We have an employment policy -- a new employment policy  
2 within recent years. It is that they can -- a person employed  
3 with the tribe can take a leave of absence to go fishing, and  
4 they won't lose their job, and they can later come back and work.  
5 That's a new policy developed.

6 Q Does the tribe purchase any fish from its fishermen?

7 A It's the reason why we took our fish plant over this year.  
8 It is very hard at times to sell fish. And the tribe decided in  
9 order to help our fishermen out, because we were expecting a very  
10 large Pink run this year, and it did come in, and it could have  
11 turned out to be very hard not being able to sell the fish, and  
12 so the tribe took it over to provide a place for the fishermen to  
13 sell.

14 Q Is it your experience as a fisheries manager that tribal  
15 members who have gone on, let's say, to get a higher education,  
16 will still come back and fish for the tribe, or is that not your  
17 experience?

18 A It is definitely the way of the Indian people. I know  
19 several fishermen that have college degrees. They will still  
20 come back and they will fish. They may get second jobs, but  
21 they -- fishing is in the Indians' blood. No matter what else  
22 they do, where they go, they will always come back and they will  
23 always fish.

24 Q And do you have family members for whom that is true?

25 A I have quite a few that have degrees and still continue to

1 fish, yes.

2 Q Is it for salmon -- are the individuals that you are  
3 referring to, in terms of the tribe, tribal members coming back  
4 and fishing after they receive a college education, is it salmon  
5 that they are fishing for or is it some other species?

6 A Both. There are some that -- there are some that fish marine  
7 waters, and they will probably only fish marine waters. There  
8 are some that fish just in a river itself, and they don't go out  
9 in marine waters. It is our custom -- it is the way they were  
10 brought up. It is the way they were taught. If they were taught  
11 to fish in marine waters, that's where they fish.

12 MS. FOSTER: Thank you. I have no further questions at  
13 this time.

14 THE COURT: Cross-examination.

15 CROSS-EXAMINATION

16 By Mr. Tomisser:

17 Q Good afternoon, Ms. Loomis.

18 A Good afternoon.

19 Q We had an opportunity to meet once before. Do you recall  
20 that?

21 A Yes.

22 Q I want to turn your attention back to the North of Falcon  
23 process for just a moment. You state that you are one of the  
24 co-chairs for that process; is that right?

25 A Yes.

1 Q And you have been the co-chair since 1983; is that right?

2 A Since it started, yes. Since we started the North of Falcon  
3 process.

4 Q 1983 about right?

5 A 25 years. 25 years back. Because we just celebrated 25 last  
6 year.

7 Q When you are sitting as co-chair for the North of Falcon  
8 process, do you sit in that capacity as a representative of the  
9 Swinomish Tribe or as Indian Northwest Fisheries?

10 A I sit in there as both, Swinomish Tribe -- I represent my  
11 tribe in the Skagit River, and I do negotiate preseason. What  
12 the co-chair does is it kind of coordinates the issues with the  
13 WDFW so that we make sure that all the tribes and all non-treaty  
14 issues are taken care of.

15 Q So you get input from other tribes as part of that process;  
16 is that right?

17 A They're part of the process.

18 Q And the overall goal of this process is to set harvest rates  
19 for the upcoming season for each species; is that right?

20 A For each river system for all the species, right, except for  
21 Steelhead.

22 Q And that management is from the ocean all the way into the  
23 terminals; is that right?

24 A Yes, it is.

25 Q So during these meetings, are there also experts in fisheries

1 management from the federal government that attend?

2 A Yes, there are. They don't always attend our meetings, the  
3 co-managers meetings, but they are there at the Pacific Fisheries  
4 Management Council. And we do meet with NOAA representatives to  
5 give them periodic updates.

6 Q And there are also then tribal experts in fisheries that  
7 would assist in this process; is that right?

8 A Every tribe has a fisheries manager and scientist to be there  
9 that represent their tribe.

10 Q And how about from the state of Washington, also fisheries  
11 experts from the state of Washington that participate; is that  
12 right?

13 A Yes.

14 Q And so all of you together then will come up with the plan  
15 for the upcoming season; is that right?

16 A Yes.

17 Q And when there are issues to be decided and decisions that  
18 have to be made, are you one of the voices that speaks there on  
19 behalf of the tribe?

20 A Only if it's in my area. Every tribe is a manager, and they  
21 will meet with WDFW, and they will make that decision within that  
22 area in the WDFW and tribe.

23 Q So for an issue that might affect the Skagit which -- that  
24 would affect your tribe then, right?

25 A Pardon?

1 Q The runs that return to the Skagit River would be one of the  
2 examples that might affect your tribe; is that right?

3 A Yes. The State and tribes would -- the State and tribes from  
4 each of the watersheds would get together and decide their  
5 objectives, and those objectives would be agreed upon with the  
6 WDFW and the State and the tribes. And then those objectives  
7 would be used to determine and negotiate the rest of their plan.

8 Q And are the plans based, with the help of the scientists, to  
9 try to ensure that we have a sustainable, healthy harvest?

10 A Those would be the objectives, the escapement and harvest  
11 rate for each of the watersheds.

12 Q And this is done every year?

13 A Yes.

14 Q And about how many people attend the North of Falcon process?

15 A Probably 100, 150 people.

16 Q Now, you also mentioned the Fraser River Panel; is that  
17 right?

18 A Yes.

19 Q And this year you're going to be a chair of that panel?

20 A No. I was the chair last year, in 2009. I won't be the  
21 chair in 2010, which takes over next week. I won't be chair.

22 Q You have served well for a year.

23 Can you tell the Court, on the Fraser River Panel, what is  
24 the issue that that panel deals with?

25 A We manage the Fraser Sockeye and Pinks coming in through our

1       waters, through panel waters, which is both Canadian and  
2       American, and so we manage and develop our fishing plan for both  
3       those areas. It is agreed upon with openings and closures, both  
4       in Canada panel waters and U.S. panel waters.

5       Q     So the people that might participate in that, would that  
6       include tribal, state, federal, and Canadian officials?

7       A     That would -- for the United States, we have state, tribal,  
8       industry and federal. And for the -- and we have only eight  
9       members.

10      For Canada, they have something like 12 members. They have  
11      many more than we do. They have quite a few industries. They  
12      have recreation. They have gill net, purse seine, troll. So  
13      it's a little bit different than ours.

14      Q     And what is the goal that the Fraser River Panel is trying to  
15      achieve?

16      A     To follow the management plan that we developed before  
17      preseason.

18      Q     So it's similar in that sense to the North Falcon process; is  
19      that right?

20      A     Similar.

21      Q     I want to ask you a little bit about the Swinomish Tribe and  
22      the organization of the tribe.

23      The tribe is organized around the senate; is that correct?

24      A     Yes, we have a senate.

25      Q     And then under the senate, there are a number of departments

1 and programs, of which fisheries is one; is that correct?

2 A Yes. All the programs are under the salmon.

3 Q If I showed you a summary of the tribal departments from the  
4 Swinomish Tribe, do you think you might recognize that?

5 A If I --

6 Q If I showed you a summary of the different departments within  
7 the Swinomish Tribe, do you think you might recognize that?

8 A Sure.

9 Q Does that look familiar?

10 A That is just one area. Can you move it up?

11 Q Let's slide it up just a little bit.

12 A Yeah. That is all the various departments. But a lot of  
13 these are under the -- a lot of these are under a director.  
14 Social services, you've got like medical, health clinic, Indian  
15 child welfare, daycare. That's all under social service. You  
16 just have a whole lot of different programs, but they're run  
17 under separate directors.

18 Q And there's also a tribal court. That would be a department  
19 too; is that right?

20 A Yes.

21 Q And so, just looking at this list of various departments, is  
22 it correct that the tribe does put a lot of emphasis on the care  
23 for its members from the very young members, infant care,  
24 daycare, up through services for the senior citizens? Would that  
25 be true?

1 A Yes.

2 Q You also provide or have a program for housing to assist the  
3 members; is that correct?

4 A Yes. It's a separate entity within the tribe, though. It's  
5 run under -- like SRSC. I don't know if you even have that under  
6 there. But SRSC is separate.

7 Q And do you have also a medical clinic?

8 A Yes.

9 Q And how is that run through the tribe?

10 A It's run under social services.

11 Q Is it fair to say, Ms. Loomis, that in running these  
12 departments, in doing the things that the tribe wants to do for  
13 its people, that there is not enough money to do everything that  
14 the tribe would like to do for its people?

15 A Well, always you can say there's never enough money. I mean,  
16 that goes without saying, I think. But yeah, we do a very good  
17 job on what we have, yes.

18 Q And so you have to be careful with the budget and prioritize  
19 the spending; is that right?

20 A Well, yeah. In any budget process, I think that's what you  
21 do.

22 Q I'd like to turn back for a moment to the children of the  
23 tribe. If I understood you correctly, one of the important  
24 traditions with the tribe is to find ways to pass along the  
25 culture and the practices of the tribe to the next generation; is

1           that correct?

2       A    Yes.

3       Q    And can you describe for the Court, how do you do that? How  
4           do you ensure that the children become aware and are taught the  
5           ways of the tribe?

6       A    It's through community gatherings. It's through teachings  
7           from the elders. It's like -- it's taught within. It's also  
8           within yourself. You know, you learn it without learning it,  
9           without even being told. You know, this is going on around you,  
10          and you're part of it, you know, so it's instilled in you.

11       Q    Do you think that that is one of the ways -- an important way  
12          for keeping the tribal culture strong and vibrant?

13       A    Yes.

14       Q    Let me ask you a little bit about these fisheries. You are  
15          the department head for fisheries, is that correct, for the  
16          tribe?

17       A    I'm the fisheries manager.

18       Q    When you first began as fisheries manager, how many people  
19          worked in your department?

20       A    Four.

21       Q    And how many work there today?

22       A    Four.

23           That's not fair. It's five.

24       Q    And so the fisheries department, I wanted to talk a little  
25          bit about some of the things that the fisheries department does

1       in Swinomish.

2           Are you familiar with the tribe's participation in a program  
3           for the comprehensive Chinook?

4       A    **Yes.**

5       Q    And that's done through the CRSC and the tribe --

6       A    **SRSC.**

7       Q    **SRSC?**

8       A    **SRSC. Skagit River System Cooperative.**

9       Q    And that's done in conjunction with the state of Washington  
10      to develop a Chinook harvest management plan; is that right?

11      A    It was written by WDFW and the two tribes and its staffs.

12      Q    The Swinomish Tribe also participate in Pacific Fisheries  
13      Management Council; is that right?

14      A    **Yes.**

15      Q    And what is the purpose of that council?

16      A    That's the North of Falcon process.

17      Q    There's also the Skagit Memorandum of Understanding; is that  
18      right? Are you familiar with that?

19      A    Is there more to it?

20      Q    This is an annual meeting with the State and three Skagit  
21      tribes that regulate the Washington fisheries that affect Skagit  
22      salmon.

23           Are you familiar with that?

24      A    I don't know what that is, and it should be me that's there.  
25      Is there another title?

1 Q That's the only title I have for it.

2 A I don't know.

3 Q That doesn't ring a bell as you're sitting here?

4 A No.

5 Q Okay. Do you participate in the Hatchery Science Review  
6 Group?

7 A I do not. I do on occasion, but I don't all the time.  
8 SRSC's harvest management biologist does.

9 Q Is that one of the people in your department?

10 A It's in SRSC.

11 Q And that evaluates hatchery programs, along with state and  
12 federal biologists; is that right?

13 A Yes, it does.

14 Q Do you participate in the Technical Review Team?

15 A I don't. My biologist -- I have two biologists that are  
16 both -- one on the Steelhead and one on the research.

17 Q And so your biologists then provide input to state and  
18 federal biologists looking at the recovery plans for ESA-listed  
19 salmon?

20 A Yes, they do.

21 Q When we look at the salmon recovery for the Skagit River  
22 area, the Samish River area, is it correct that the estuary  
23 recovery and habitat is considered the primary goal for salmon  
24 recovery for the Skagit and Samish Rivers?

25 A I don't think that we have prioritized anything in the

1 recovery plan yet. I think that's in the making.

2 Q The Swinomish Tribe does create a tribal management plan; is  
3 that right?

4 A Oh, is that the Samish you're talking about?

5 Q Yes. A tribal management plan?

6 A Yes.

7 Q And in that plan, the estuary habitat is identified as a  
8 primary limiting factor for salmon; is that right?

9 A I'm not sure about that.

10 Q If I showed you a copy of the plan, do you think it might  
11 refresh your memory about that?

12 A No. I think it would be best if you ask the biologist that  
13 is coming up after this.

14 Q Have you reviewed, as the head of the fisheries department  
15 for the tribe, the fisheries management --

16 A I have reviewed it, but I don't get into the technical. We  
17 have done a lot of -- particularly spent a lot of time in the  
18 protection area and -- because that was where we didn't have  
19 agreement on. And so I did work on that one, but I don't get  
20 into the technical, scientific details. I am not a scientist.

21 Q I wasn't asking you for the details, just if you were  
22 familiar with the report at this point.

23 A I am, but I don't live it everyday, you know, so I -- I'm not  
24 one that can give you details.

25 Q Okay. I wasn't really pressing you for the details. I

1       thought if I showed you a copy of it, it might refresh your  
2       recollection as to what it said since you had reviewed it at some  
3       point.

4       A     You could if you want, but I don't think it would help you --  
5       help me.

6       Q     Well, let's see if it might. Let me show you the cover page  
7       here and ask you if you recognize it.

8       A     (Witness peruses document.)

9       Q     Have you had a chance to look at that for a moment?

10      A     I see it, but that is not the Chinook Comprehensive  
11       Management Plan.

12      Q     Is it the Swinomish plan?

13      A     Well, it could be planning. And planning on the reservation,  
14       they do some work on it. But the comprehensive Chinook plan is  
15       the one I would look at.

16      Q     Have you seen reference, Ms. Loomis, to the conclusion that  
17       fish passage barriers are not deemed essential for salmon  
18       recovery on the Skagit and Samish Rivers?

19      A     Would you repeat that?

20      Q     Sure. Have you seen the report's conclusion that fish  
21       passage barriers are not deemed essential for the Skagit and  
22       Samish Rivers; that it is the estuary that is primary?

23      A     I wouldn't --

24                   MS. FOSTER: I'm going to object, your Honor. I don't  
25       believe that counsel has laid the foundation for this.

1                   MR. TOMISSE: She's the head of the fisheries  
2 department, your Honor. I'm just asking if she knows.

3                   THE WITNESS: I did not see that.

4                   THE COURT: Ms. Loomis, hang on a second.

5                   The objection on foundation grounds will be overruled. She  
6 has to answer the question.

7                   THE WITNESS: I have not seen that.

8                   By Mr. Tomisser:

9                   Q     Let me ask you another question, then, on the fisheries side  
10 of the equation. I understand that the budget for the Swinomish  
11 Tribe and fisheries department is about 500,000 a year; is that  
12 correct?

13                  A     Just for Swinomish? Is that just for Swinomish?

14                  Q     Yes.

15                  A     I think it's lower than that.

16                  Q     What do you think it is?

17                  A     I think it's around 3- or 400.

18                  Q     3- or 400,000?

19                  A     Yeah.

20                  Q     And is it correct that the annual revenue generated by the  
21 fishing with the Swinomish Tribe is about \$3 million a year?

22                  A     That's not salmon.

23                  Q     That's everything; is that right?

24                  A     That's everything.

25                  Q     Shellfish, everything?

1 A Yeah. Most of it is shellfish.

2 Q All right. And from that budget and the revenue that is  
3 generated, it is correct, is it not, that the tribe does not  
4 spend any of that revenue on barrier correction?

5 A I guess I'm not understanding your -- you said revenue for --  
6 is not for the tribe.

7 Q Of the tribe's own revenue --

8 A No. I do not know what you're talking about, then, because I  
9 thought you were talking about fishers' income, which would not  
10 go to the tribe. You're talking about --

11 Q The tribal revenue. Money that comes to the tribe from  
12 fishing.

13 A No. Then the answer would be no, because they don't get that  
14 much money from fishing.

15 MR. TOMISSE: Thank you, Ms. Loomis.

16 THE COURT: Any redirect?

17 MS. FOSTER: Yes, your Honor.

18 REDIRECT EXAMINATION

19 By Ms. Foster:

20 Q Ms. Loomis, I believe you testified on cross-examination that  
21 the fisheries department has four employees -- or five employees,  
22 I guess now?

23 A Yes.

24 Q And that previously it had four employees. But in the years  
25 since you've been fisheries manager, have you seen a growth in

1 the tribe's staff with regard to -- well, actually, strike that.

2 Is the fisheries department -- is the fisheries department  
3 involved with fisheries management as well as habitat issues, or  
4 is it just one of them?

5 A The Swinomish fisheries department is only involved with  
6 shellfish management and harvest management and data collection.

7 Q And are there employees at the tribe in a different  
8 department that address habitat issues?

9 A SRSC does, which is part of Swinomish.

10 Q And since you've been a fisheries manager, what has the  
11 growth been in the Skagit River System Cooperative in terms of  
12 number of employees?

13 A Okay. That's grown from like about five employees to 27  
14 employees.

15 Q And in the planning department, I believe you testified on  
16 direct that there were staff in the planning department that also  
17 address on-reservation fish habitat issues?

18 A Yes.

19 Q Do you know how many people are employed currently in the  
20 planning department who address fish habitat issues or fish -- or  
21 at least issues related to fish habitat?

22 A I want to say about six, maybe more.

23 Q And since you first became a fisheries manager back in the  
24 late 70s, have you seen a growth in that particular department  
25 with regard to staff that address fish habitat issues?

1 A Yes. They didn't have any money when they started out. They  
2 didn't do any fish habitat stuff.

3 Q Do you know what percentage of the tribe's budget is directed  
4 towards fisheries and natural resource issues?

5 A How much of the tribe's resources?

6 Q Yeah. What percentage of their budget is directed towards  
7 fisheries and natural resource protection issues.

8 A I don't know that I can answer. There's quite a bit that  
9 goes into the SRSC department, more so than mine, because mine  
10 only does harvest. And although I do policy with SRSC, I  
11 don't -- their direction comes with the board, not with just  
12 individuals.

13 Q Do you know what the budget of the Skagit River System  
14 Cooperative was last year?

15 A 6 million.

16 MS. FOSTER: Thank you. I have no further questions at  
17 this time.

18 THE COURT: Ms. Loomis, thank you. You may step down.  
19 The plaintiffs' next witness.

20 MS. FOSTER: The plaintiffs would call Lawrence  
21 Wasserman to the stand.

22 Whereupon,

23 **LAWRENCE WASSERMAN**

24 Called as a witness, having been first duly sworn, was examined  
25 and testified as follows:

1                   THE CLERK: Will you please state your name and spell  
2 your last name for the court reporter.

3                   THE WITNESS: Lawrence J. Wasserman, L-A-W-R-E-N-C-E,  
4 W-A-S-S-E-R-M-A-N.

5                   THE COURT: You may inquire.

6                   DIRECT EXAMINATION

7                   By Ms. Foster:

8                   Q Mr. Wasserman, where are you employed?

9                   A I am employed by the Swinomish Indian Tribal Community in  
10 LaConnor.

11                  Q And what is your position with the tribe?

12                  A Environmental policy manager.

13                  Q And since when -- when did you start with the tribe?

14                  A 2007.

15                  Q And what are your responsibilities with the tribe?

16                  A My responsibilities are to oversee environmental protection  
17 issues, predominantly but not exclusively off the reservation. I  
18 deal with SRSC staff and others, overseeing permits and providing  
19 advice to the tribe with regard to mechanisms to protect tribal  
20 resources. In fulfilling that job, I need to stay current with  
21 fisheries literature to make sure that I understand what the best  
22 ways are to carry out those tasks.

23                  Q And where were you employed prior to working for the  
24 Swinomish Tribe?

25                  A The Skagit River System Cooperative.

1 Q And how long were you employed by SRSC?

2 A Approximately 15 years.

3 Q And would you tell the Court, please, what your educational  
4 background is?

5 A I have an undergraduate degree in biology from the State  
6 University of New York at Buffalo and a graduate degree in  
7 fisheries from the University of Washington, Seattle.

8 Q And are the honors that you have received and your  
9 publications listed in the declaration that you have prepared for  
10 this case?

11 A Yes, they are.

12 Q And how many years all together would you say you have spent  
13 on salmon biological issues and habitat management issues?

14 A This will be my 30th year.

15 Q Mr. Wasserman, did you prepare a Declaration in Lieu of  
16 Direct Testimony for this sub-proceeding?

17 A I did.

18 MS. FOSTER: Madam Clerk, would you hand to the witness  
19 Exhibit AT-0-10, please?

20 By Ms. Foster:

21 Q Mr. Wasserman, would you turn to the last page of the  
22 declaration, please?

23 A Yes.

24 Q And is that your signature?

25 A Yes, it is.

1 Q And what is the date of the declaration?

2 A 30th day of March, 2009.

3 Sorry for my voice. I am losing it.

4 Q Is there a report attached to your declaration?

5 A Yes, there is.

6 Q Does your declaration contain your background information; in  
7 other words, your resume?

8 A It does.

9 Q Did you prepare that report for this proceeding?

10 A I did.

11 Q Are there exhibits both embedded in that report as well as  
12 attached to that report?

13 A Yes, there are.

14 Q And did you recently make any corrections to your report at  
15 my request to address certain evidentiary challenges by the  
16 State?

17 A Yes, I did.

18 Q And those changes now appear in AT-010?

19 A Yes.

20 Q And do you adopt the declaration of Lawrence J. Wasserman  
21 dated March 30, 2009, and the report identified as AT-010, and  
22 the exhibits attached thereto as your direct testimony here  
23 today?

24 A I do.

25 Q Mr. Wasserman, could you turn, please, to AT-010-14, which is

1           **Attachment M to your report?**

2           MS. FOSTER: Your Honor, I have provided to  
3           Mr. Wasserman a copy of his report, which I have shared with the  
4           State -- the State's attorneys. And Mr. Wasserman will be using  
5           his report, because he has tabbed a number of pages to help the  
6           testimony of this -- his testimony go more smoothly, if that  
7           would be okay with the Court. It is an exact replica of AT-010.

8           THE COURT: I don't have any problem with him looking at  
9           his report during his testimony.

10          The State had objections to the original AT-010 in the  
11         beginning. Does the State still continue to have those  
12         objections?

13          MR. TOMISSEK: We maintain an objection to Exhibit M,  
14         Your Honor, which is the exhibit you just listed.

15          THE COURT: Counsel, as we go through this, then, the  
16         Court -- because I've not read through his testimony either, but  
17         I'll be cognizant of the State's objections that are set out in  
18         the pretrial report.

19          MS. FOSTER: Okay. Your Honor, I do have a few  
20         questions of Mr. Wasserman with regard to Attachment M.

21         By Ms. Foster:

22         Q      Mr. Wasserman, are you familiar with an individual by the  
23         name of Curt Buchanan?

24         A      Yes, I am.

25         Q      And is Attachment M, otherwise known as AT-010-14, an e-mail

1           that purports to be from a Curt Buchanan?

2       A    Yes.

3       Q    And what is the date of that e-mail?

4       A    December 6th, 2004.

5       Q    And at the time the e-mail was generated, do you know where  
6       Mr. Buchanan was employed?

7       A    He was employed by the Washington Department of Fish and  
8       Wildlife in LaConnor, Washington.

9       Q    And what was his position there?

10      A    Area habitat biologist, I think is his title.

11      Q    Do you know whether or not he was responsible for issuing  
12       hydraulic project approvals for the Skagit watershed?

13      A    Yes.

14      Q    As well as compliance with those permits?

15      A    Yes.

16      Q    And are the individuals to whom the e-mail was sent, the  
17       e-mail in AT-010-14, that that particular e-mail was either sent  
18       to or copied to, are also WDFW employees?

19      A    Yes, they are.

20      Q    And in the course of your dealings with Mr. Buchanan, did  
21       Mr. Buchanan provide a copy of the e-mail in AT-010-14 to SRSC?

22      A    Yes, he did.

23           MS. FOSTER: At this time, I would move to admit AT-010  
24       and the exhibits attached to AT-010. That is AT-010-2 through  
25       18.

1                   THE COURT: Any other objections from the State, other  
2 than the ones that are still listed?

3                   MR. TOMISSER: Only the ones that are listed in the  
4 pretrial order, your Honor, which is hearsay to the content of  
5 the substance of the e-mails.

6                   MS. FOSTER: Your Honor, if you wish, I can address that  
7 issue in terms of a legal argument. I believe that the e-mail  
8 and the attachments are admissions of a party opponent and are  
9 admissible, therefore, under Federal Rule 801(d)(2)(d). The  
10 e-mail and the attachment were made by an employee of WDFW during  
11 the course of his employment and concern a matter within the  
12 scope of his employment.

13                  The case law in the Ninth Circuit is clear on this issue, and  
14 I have -- there are several cases from the Ninth Circuit.  
15 Sea-Land Service, Incorporated v. Lozen International at 285 F.3d  
16 808, at Page 821, 2002, in that case the Court ruled that the  
17 text -- because the text of the e-mail indicated that it was  
18 authored by a person identified in another trial exhibit as a  
19 company employee and the subject matter of the internal company  
20 e-mail appeared to concern a matter within the scope of his  
21 employment, it was admissible.

22                  In this particular case, I believe that the e-mail here  
23 presents essentially the same scenario. Mr. Buchanan was an  
24 employee of WDFW at the time he sent the e-mail. The contents of  
25 his e-mail were within the scope of his employment. The contents

1       of the e-mail itself demonstrate this, as well as the testimony  
2       of Mr. Wasserman.

3           The field notes that were attached to the e-mail indicate  
4       that they were prepared by Mr. Buchanan during his employment and  
5       within the scope of his employment. As such, I believe that the  
6       e-mail, the field notes, and the meeting notes that are attached  
7       thereto are all admissible admissions under 801(d)(2)(d).

8           Additionally, Mr. Buchanan references some photographs that  
9       were taken by a Mr. Keith Wyman in the body of his field notes,  
10      which Mr. Wyman is identified as an SRSC employee. I believe  
11      that Mr. Buchanan's inclusion of them within the field notes  
12      indicate that the photographs were in fact adopted by him, and  
13      thus admissible under FRE 801 -- excuse me, 801(d)(2)(b), because  
14      they are an adoptive admission because he included them within  
15      his notes as well as commented on them.

16           THE COURT: All right. Counsel, I have no problem with  
17      admitting AT-010 and AT-010-2 through 18. Those are all specific  
18      attachments. The Court will overrule the objections as made for  
19      purposes of getting them into the record.

20           Ms. Foster, in the future, as I review the materials with  
21      greater care, if the Court should agree with any of the  
22      objections that are made in the pretrial order, then the Court  
23      will make that known at the time in its opinion. All right?

24           MS. FOSTER: That would be fine, as long as I might be  
25      able to reserve an opportunity to present some legal argument

1 with regard to any of those issues.

2 THE COURT: Thank you. For now they will be admitted.

3 MS. FOSTER: Thank you.

4 By Ms. Foster:

5 Q Mr. Wasserman, would you briefly describe for the Court what  
6 the life history characteristics common to anadromous salmonids  
7 are?

8 A Yes. There's general characteristics of all anadromous  
9 salmonids. They all spawn in fresh water, lay their eggs in the  
10 gravel. The eggs emerge from the gravel and spend from a few  
11 days to a few years in fresh water. Those fish, upon reaching  
12 the appropriate level of maturity in fresh water, convert their  
13 body condition to be able to sustain themselves in saltwater,  
14 become what's called smolts, travel out to sea, and while at sea  
15 become large, start to create -- undergo circumstances in their  
16 body to start to produce sexual products, so that when they  
17 return to fresh water, the smolts turn into adults, the adults  
18 return to fresh water, usually to their native streams, where  
19 they spawn. And other than Steelhead, all salmon die. Many of  
20 the Steelhead die after spawning, but not all of them.

21 So the general characteristics of returning to their native  
22 stream, fresh water residence, out to the ocean, and then return.

23 Q And what are the habitat components that are essential for  
24 salmon?

25 A There are five components that are essential for salmon. One

1       is access to the sea, access to and from the sea; adequate  
2       shelter; good clean spawning gravel; adequate food; abundant  
3       supply of clean water.

4       Q     And would you explain to the Court why access is important to  
5       salmon?

6       A     As I said, when salmon return from the sea, they have a  
7       homing instinct to go back to their home stream. And because  
8       they don't feed, they have a limited time to get to that home  
9       stream, at which point they spread throughout a watershed looking  
10      for appropriate substrates, gravels to spawn in. And their  
11      ability to get there in a timely fashion and in a geographically  
12      dispersed fashion is critical both to be able to spread fish  
13      around the watershed and keep the densities, the number of fish  
14      in a particular area, low enough so their survival is high, but  
15      also in case of any kind of environmental disasters, fish spread  
16      throughout a watershed can sustain themselves. So if one  
17      tributary is damaged by a mud flow or a forest fire, throughout  
18      the watershed you have a robustness for that entire population.

19           So for adult salmon, they need to get back to their streams.  
20          For juvenile salmon, shortly after they emerge from the gravel,  
21          they look for preferred depths and velocities and substrates in  
22          the stream environment that allows them to avoid predators and  
23          feed in an energetically efficient way. So immediately upon  
24          emerging from the gravel, they move both upstream and downstream  
25          to find those preferred habitats.

1           And most specifically for some species in the fall, with the  
2 onset of fall rains, they will actually move as juvenile fish  
3 upstream into the tributaries, where they can find areas of lower  
4 velocities rather than encountering very high flows in a mainstem  
5 river. So we see in some instances quite large upstream  
6 movements. So both adult and juvenile salmon move upstream, as  
7 well as juvenile salmon moving downstream.

8       Q     Showing you a photograph on Page 4 of your report, can you  
9 please tell us what that photo depicts in relation to the other  
10 four essential habitat components?

11      A     The purpose of this photograph is to illustrate the kind of  
12 good habitats that salmon require. So just a few things to point  
13 out in this photograph. This is a creek that is good habitat -  
14 not pristine habitat, good habitat - but I wanted to point out  
15 some of the attributes that fish are looking for and they need in  
16 order to thrive and reproduce in a sustainable way.

17           A few things to point out. We have some habitat here in this  
18 area. The velocities on the inside of this area are slow. The  
19 gravel is small. It might be a place that juvenile fish would  
20 live. Also you can see small gravel there. Cobbled in the  
21 bottom of the stream is small -- and fish may spawn in those  
22 areas. They look for clean gravel that doesn't have a lot of  
23 sediment and that has water flowing through it.

24           On the right side of the screen, over here for example, as  
25 the water comes around that bend, the water is deeper. Different

1 age classes of salmon, older juvenile fish might be there. Adult  
2 fish may want to hold there during the summer months to wait for  
3 them to be able to spawn. Riparian vegetation in this area  
4 provides a number of things. Insects fall off that riparian  
5 vegetation and provide a food supply for the salmon. I should  
6 point out that good, clean gravels provide food as well for the  
7 juvenile salmon as well. They eat insects.

8 The last point I think I would make is that if we take a look  
9 at this piece of wood in the stream here that I pointed out,  
10 these trees along the stream side need to fall into the stream.  
11 And when they do, they create critical habitats for salmon as  
12 well. If you can imagine a log that falls in the stream,  
13 sediment will pile up behind it, that may form gravel for salmon  
14 to be spawning in.

15 Downstream of it, as the water flows over that log, it  
16 creates a deep pool for fish to be hiding in. So this wood  
17 structure here allows the fish to be hiding, escaping from  
18 predators, provides a food supply, and creates those kind of  
19 diversities and channels that are important to be able to sustain  
20 a wide sweep of salmon species, as well as diverse life history  
21 strategies. Life histories being spawning, juvenile rearing,  
22 time for emergence, smolt, and out to sea.

23 Q Mr. Wasserman, in the fourth section of your report,  
24 beginning on Page 9, you address factors influencing survival and  
25 mortality of salmon. One of those concepts that you discuss is

1           called density-dependent mortality.

2           So now showing you Figure 5.1 on Page 11, could you tell the  
3           Court what this figure portrays, please?

4           A     This is a hypothetical figure that portrays the relationship  
5           between the number of female spawning fish and the number of  
6           smolts, which is the number of fish that will go out to sea. It  
7           is that relationship.

8           Q     Could you then explain what -- interpret this figure for us,  
9           please?

10          A     The purpose of this figure is to explain the idea of  
11           density-dependent mortality habitat limitations. And so if I  
12           could just try to explain what the curve demonstrates.

13          If you take a look at Curve A, to start with, and we use that  
14           as a baseline. If you notice the shape of that curve, it bends  
15           over. You might think that, as the number of female spawners  
16           increases, you would have a direct relationship and the number of  
17           smolts would increase in direct relationship as if it were a  
18           straight line. But that doesn't happen. As you see, that curve  
19           bends over, Curve A.

20          The reason that curve bends over is that, except at very,  
21           very low numbers of spawners, the numbers of juvenile fish,  
22           either the amount of spawning habitat or the number of juvenile  
23           fish produced, start to compete with each other. And because of  
24           that competition, their survival is less, their ability to  
25           withstand the rigors of summer and wintertime is less. And so

1 the more competition they have, while you still see that curve  
2 increasing, and there's a total number of smolts increasing, the  
3 efficiency, if you will, the ratio between spawners and smolts,  
4 isn't rising so fast. And so the purpose of this curve in Curve  
5 A is to show this idea of density-dependent mortality. As the  
6 densities come up because we have more spawners, the mortality  
7 goes up as well. And so the number of smolts, the number of eggs  
8 that survive to be a smolt goes down. So Curve A is a stream  
9 with a certain amount of habitat, and we have that relationship.

10 Curve B would be another stream where the amount of habitat  
11 -- the same stream, we've opened up a lot of habitat. If you  
12 take a look, for example, and compare Curve A to Curve B, and  
13 take a look at, for example, the number of 200 female spawners,  
14 approximately, let's say, for 200 female spawners in Curve A, you  
15 have, let's say, 7,000 smolts.

16 With Curve B, where you have more habitat, the same number of  
17 spawners produces 11- or 12,000 smolts. There's less  
18 competition. They're able to thrive more. There's less  
19 competition for food and space. So the advantage of having more  
20 habitat is, as you get more spawners, you get an increased number  
21 of smolts per spawner.

22 So the purpose of this curve is really to demonstrate, and  
23 these are curves that are routinely used in fisheries management  
24 in trying to describe the relationship between spawners and  
25 smolts. The number of smolts is a very, very good measure of the

1       number of adults available to come back for harvest by anybody or  
2       for escapement. So the purpose of this curve is to graphically  
3       demonstrate the importance of increasing the amount of habitat  
4       with regard to efficacy of the number of females spawning and the  
5       number of smolts produced.

6       Q     You have used the term "escapement." Would you just define  
7       that?

8       A     Escapement is the number of fish that make it back to the  
9       spawning grounds to spawn.

10      Q     Mr. Wasserman, generally speaking, what impacts do improperly  
11       designed culverts have upon salmon and salmon habitat?

12      A     There are a variety of impacts, both with adults and with  
13       juveniles. I will start with the adults. As I said before,  
14       adults have only a limited amount of time.

15            There are two major factors. One is culverts have impacts  
16       both -- access problems, but the culverts themselves may  
17       adversely affect the amount of habitat as well, those ecosystem  
18       functions that I talked about in the photograph with Day Creek,  
19       having appropriate sediment, the amount of wood, proper flows.  
20       So those are the two major factors that culverts affect, in broad  
21       strokes.

22      Q     Why don't you go on, if you would, please, and describe more  
23       specifically how fish passage barrier culverts impact adult  
24       salmon.

25      A     How they affect adult salmon?

1 Q Yes.

2 A They affect adult salmon in a number of ways. As I said  
3 before, these fish, when coming back from the sea, have a limited  
4 amount of time to spawn. They stop feeding, so they only have so  
5 much energy to get to their spawning grounds.

6 If they get to the culverts, they are waiting for flows to be  
7 adequate to get through the culvert or they can't get through the  
8 culvert. They wait and wait and wait, and in some instances they  
9 die unspawned because they can't get back to where they want to  
10 go. Or they can die by jumping out of a culvert that's  
11 inadequate, and they bang into the sides of the culvert and can  
12 have direct mortality that way.

13 The other thing that can occur with passage barriers is, if  
14 they can't spawn upstream of the culvert, they may be forced to  
15 spawn downstream of the culvert in and among fish that are  
16 already spawning. So if they can't get through the culvert and  
17 spawn upstream, and they're forced to spawn downstream and they  
18 choose to do that, and there are other fish spawning in that  
19 area, two things can happen. They can spawn on top of fish that  
20 have already spawned there. Superimposition of redds, they call  
21 it. The eggs that are already in the gravel get dug up and  
22 disturbed. Those eggs don't survive.

23 Or if they spawn successfully downstream, there's a higher  
24 concentration of fish spawning in that limited amount of habitat  
25 downstream. So as I pointed to the curve before, that

1 competition is greater, and the survival is less, and the number  
2 of smolts produced go down.

3 And the final factor is that we know that these fish coming  
4 back into these watersheds where you have low production - in  
5 other words, they can be relatively pristine - these salmon  
6 carcasses when the fish die, there are these bags of nutrients  
7 that are dying that are then used. They then act to drive that  
8 system, where the insects are eating them, the insects grow  
9 better, and then the juvenile fish eat better.

10 So you have this nutrient reserve, basically marine-borne  
11 nutrients in the form of these carcasses coming upriver, being  
12 deposited in the stream to be used, to be eaten by insects, by  
13 the fish. And in fact, all sorts of wildlife utilize these.  
14 Those are the implications associated with impassable adult  
15 barriers.

16 Q And so would you now describe for the Court, please, what the  
17 impacts of impassable barriers are on juvenile salmon?

18 A Well, as I said before, the requirements of these juvenile  
19 fish is to move both upstream and downstream. By and large,  
20 they're moving to try to increase their growth as fast as they  
21 can so that the bigger they are when they go out to sea, the  
22 greater survival they have. So they're trying not to get eaten,  
23 and they're trying to grow. Energetically, the most advantageous  
24 stream positions.

25 And so they tend to be trying to disperse themselves in ways

1       that create the most favorable conditions, which are essentially  
2       low velocities, or the appropriate velocities that they like, but  
3       also, as I said, to sustain themselves against flooding events.  
4       Fish can only swim in streams in water that's moving so fast. If  
5       it's moving just so fast, they get swept downstream. By being  
6       able to find these preferred habitats, in moving upstream and  
7       downstream direction, they're able to increase their survival as  
8       well.

9       Q      Mr. Wasserman, would you now relate these impacts, if you  
10     would, back to Figure 5.1, this curve that's on the screen?

11      A      Sure. So if you go back to 5.1 that's on your screen, again,  
12     I'd just ask to compare Curve A and B. The difference between  
13     Curve A and Curve B is really -- it can be the same stream.  
14     You've opened up the amount of habitat. So you're really  
15     shifting that relationship on the number of female spawners to  
16     smolts, that you're getting more smolts for a particular number  
17     of females because there's more space, less competition, they can  
18     find more refuge. Those good habitat characteristics that I  
19     showed you from Day Creek are available over a larger area.

20           So that's the advantage of opening up culverts. It allows an  
21     increase in habitat, just in terms of density-dependent  
22     mortality. There are other advantages of having appropriately  
23     designed culverts as well.

24       Q      And could you please describe for the Court now how  
25     improperly designed culverts impact that habitat of the salmon?

1       A     Sure. So culverts are designed initially to pass water  
2           underneath a road. But fish are traveling in that same waterway,  
3           and so they need to be designed, obviously, for the  
4           characteristics to pass fish.

5           But moving down that stream, in addition to the water and the  
6           fish are sediment and wood. And if a culvert is improperly  
7           designed and can't carry the amount of water, for example, that  
8           it needs to carry, then water spills over the road with dire  
9           consequences for fish. They may get swept over the road, down  
10          ditches. And in one of the documents that we've talked about,  
11          there's a reference to that, in that the fish being swept into  
12          ditches and dying. So we have a fish passage problem if they  
13          can't carry the capacity of the water.

14          Important as well is that if sediment or logs get backed up  
15          behind a culvert because it's too small, it forms a dam behind  
16          that culvert. And if that dam gets large enough and the flows  
17          get too high, that culvert can blow out, the road can blow out  
18          and wipe out all the salmon and salmon habitat downstream.

19          And finally, because of sediment accumulating behind  
20          culverts, there's a requirement -- in order to not have this dam  
21          form, or to at least let the fish travel, then there's  
22          maintenance required if these culverts are inadequately designed.  
23          That has consequences as well.

24       Q     Mr. Wasserman, to your knowledge, have the activities of the  
25          State in maintaining its culverts adversely impacted salmon or

1       salmon habitat?

2       A     Yes, they have.

3       Q     Would you please explain how?

4       A     Maybe I can explain with some photographs.

5       Q     Tell us which photograph, please.

6       A     Attachment K.

7       Q     That would be AT-010-12.

8       A     This is a culvert -- no, that's not right, I don't believe.

9       Excuse me. Let me just make sure I've got the right one.

10      It would be H, Alix, excuse me.

11           MS. FOSTER: I'm sorry, your Honor.

12      By Ms. Foster:

13      Q     Okay, Mr. Wasserman.

14      A     Well, let's start with this one. We can find the other one.

15           There's a culvert under this road. This is Red Cabin Creek.

16           And you can see that this sediment is right up to the top of the  
17           road. There isn't a place for the water or the fish to go.

18           We just need to find the right photographs so this makes some  
19           sense. There is a photograph dated --

20      Q     Tell us, if you would, Mr. Wasserman, which attachment it is  
21           that you'd like to address that's in your report.

22      A     I believe it's J.

23           Okay. Thank you. Sorry about that.

24           This is the photograph. This is the culvert that we were  
25           just looking at. This is called a box culvert. It's made out of

1 cement. You can see the two holes where the water is able to go  
2 underneath the road and through that culvert. But you can see  
3 from the previous photograph, that culvert was completely filled  
4 up with gravel, right up to the top.

5 So routinely what happens is these culverts have to be  
6 dredged. And in dredging that culvert -- what this stream looks  
7 like, even though there's no water in it -- the lack of water  
8 isn't necessarily a result of the maintenance. But if you  
9 compare this stream to the Day Creek stream, very little  
10 vegetation, there's not pools and ripples. It's just a straight  
11 gouged-out channel with a limited amount of habitat.

12 If we show Photograph K -- so this is the same culvert in  
13 2002. And what happened was the State, when they dredged this  
14 stream out, created a hole to let some of the sediment fill up in  
15 that hole and to allow for water and fish to pass through. And  
16 they attracted these adult salmon and juvenile salmon into this  
17 hole, flows came, the fish got attracted in there, the flows went  
18 away, and the salmon were trapped here. So now we have all these  
19 dead salmon that have not spawned as a result of these dredging  
20 activities.

21 So what we see from the dredging activities are a number of  
22 things. This is all maintenance associated with culverts. We  
23 see the loss of habitat associated with that. We see that when  
24 fish have spawned in these kind of sediments, which are similar  
25 in some sense to the sediments I showed you before, when they

1 dredge out these streams, they're actually dredging out the  
2 redds.

3 And because streams want to maintain a certain gradient, even  
4 beyond the area where they dredged there can be what's called  
5 down-cutting or head-cutting where, as a stream tries to  
6 re-establish a gradient, it starts to eat away at these upstream  
7 substrates in the stream where there also may be salmon redds.  
8 So there are very dire consequences not only if fish can't get  
9 past during the flood, but from the maintenance itself.

10 Q Mr. Wasserman, in 1994, did you and your colleagues at SRSC  
11 conduct a study into the factors limiting the production of  
12 Skagit Coho?

13 A We did.

14 Q And what -- were the results of that study published in a  
15 scientific journal?

16 A Were they published?

17 Q Yes.

18 A Yes, they were.

19 Q And what is the name of that article?

20 A I need to look for the title. Excuse me.

21 Q I'd turn your attention to the references in the back of your  
22 report, Mr. Wasserman.

23 A There we go. Thank you.

24 The title was "Estimating Coho Salmon Rearing Habitat and  
25 Smolt Production Losses in a Large River Basin and Implications

1       for Habitat Restoration."

2       Q     And did you receive an award for that publication?

3       A     We did.

4       Q     From whom did you receive that award, please?

5       A     That was from the American Fisheries Society.

6       Q     And what was that award?

7       A     The best paper of the year in the *North American Journal of*  
8       *Fisheries Management*.

9       Q     And please explain what you were investigating in that study.

10      A     We were trying to look at what were the greatest limitations  
11     for Coho production in the Skagit River. And we looked at it in  
12     terms of where habitat had been lost, and again, what were the  
13     biggest factors and what kind of land uses were associated with  
14     that.

15      Q     And what did you conclude at the end of your investigation?

16      A     What we concluded is that hydro modifications, which are  
17     diking and dredging streams, had the largest impact. But the  
18     second largest impact in the Skagit River for Coho was from  
19     blocking culverts.

20      Q     Mr. Wasserman, would you please summarize the key points in  
21     your report for the Court?

22      A     The number of returning adults is in large measure a function  
23     of how many smolts can be produced. The number of smolts that  
24     are produced in most watersheds are directly related to the  
25     amount of habitat they have available to them, and the culverts

1       adversely impact the number of smolts being produced, either by  
2       density-dependent mortality or by these adverse environmental  
3       circumstances.

4       Q     And do you have an opinion, Mr. Wasserman, concerning the  
5       correction of culverts as a method of habitat protection and  
6       restoration?

7       A     I do.

8       Q     And what is that opinion?

9       A     That culverts are one of the most effective and well-  
10      documented ways to restore salmon throughout Puget Sound and the  
11      State of Washington.

12      Q     And what is the basis for that opinion, please?

13      A     It's based on my opinion of 25 or 30 years working out in the  
14      field, written opinions by my colleagues and others, and the  
15      actions of others in establishing that as being a high priority  
16      throughout the watersheds.

17      Q     Is it also based upon your own investigation in the Skagit?

18      A     Certainly. My investigations and other literature as well.

19      Q     And you say that your opinion is supported by the findings  
20      that are reported in some scientific literature. Are those  
21      studies cited in your report?

22      A     Yes, they are.

23      Q     And have those studies been published?

24      A     Some of them have been. Most of them have been.

25      Q     And were they peer reviewed?

1 A Some of them have been.

2 Q Do the scientists rely upon -- do scientists routinely rely  
3 on the published studies of other scientists in their work?

4 A Certainly they do.

5 Q And do those studies rely upon generally accepted  
6 methodologies?

7 A For it to be a peer-reviewed article and to pass muster in  
8 peer-review publications, they certainly do.

9 Q In your professional opinion, do the studies reasonably and  
10 reliably support your opinion that culverts are one of the most  
11 cost-effective proven methods of habitat protection and  
12 restoration?

13 A Yes, they do.

14 Q Would you please describe for the Court, Mr. Wasserman, some  
15 of the benefits from correcting improperly designed road  
16 culverts, and in doing so please contrast these benefits, if you  
17 will, with the benefits that may result from other habitat  
18 protection or restoration measures.

19 A Sure.

20 THE COURT: Ms. Foster, maybe before we get to that,  
21 let's go ahead and take our afternoon break at this point in  
22 time, give our reporter a little bit of a break.

23 (At this time a short break was taken.)

24 By Ms. Foster:

25 Q Mr. Wasserman, would you please describe for the Court some

1       of the benefits from correcting improperly designed road  
2       culverts. And in doing so, please contrast those benefits, if  
3       you will, with benefits that may result from other habitat  
4       protection and restoration measures.

5       A     Certainly. It's been documented in my report. I'll try to  
6       be succinct. There's an immediate access and immediate benefit  
7       to additional habitat when we replace a culvert. When the fish  
8       couldn't get there, you fix the culvert, they immediately get the  
9       benefit of the new habitat.

10      If you compare that to having to plant trees, shade, it can  
11      take 10, 20, 50 years to get trees large enough. Or if it's  
12      moving and damming, it will take 10 or 20 years to get the  
13      sediments behind the dam.

14      So we get immediate benefits for fixing a culvert. We have a  
15      high confidence in design. By and large, we know how to fix  
16      culverts. We don't always do it the right way, but we know what  
17      it takes to get fish through culverts. So we have a high  
18      confidence compared to many other more experimental restoration  
19      activities.

20      It's fairly easy to monitor. If there were no fish there  
21      before, and we open a culvert and we can count fish, we can tell.  
22      Sometimes it's more difficult in fisheries management to see the  
23      benefits of a restoration project because it may be making better  
24      habitat in a particular area, and it's really hard to discern the  
25      benefits.

1       A critical factor is that there's minimal impacts on adjacent  
2 land use or landowners. The culverts we're talking about in this  
3 case are under state roads, and so it's relatively infrequent  
4 where there needs to be a condemnation of other people's land or  
5 asking people to sell their land. And this really contrasts with  
6 so many other areas of salmon restoration where we're asking on a  
7 voluntary basis for landowners to do something different on their  
8 property. And we've had quite a bit of resistance across at  
9 least Skagit County in the watershed for people not wanting to  
10 change their underlying land uses.

11       For roads, it's pretty straightforward, for culverts. It's  
12 mostly under a right-of-way. It can be fixed in a very isolated  
13 place and yet the benefits can be quite far-reaching. It's cost  
14 effective. There have been some studies that have shown that,  
15 really, compared to other kinds of restoration activities, the  
16 cost per smolt produced is relatively low, and that cost factor  
17 is also influenced by the fact that there's a high confidence  
18 that these things are going to work.

19       And finally, we get benefits with a broad sweep of culvert  
20 repairs. We get a very broad geographic distribution of  
21 benefits, and the cumulative effects can accrue across a variety  
22 of watersheds.

23           MS. FOSTER: Thank you. I have no further questions at  
24 this time.

25           THE COURT: Cross-examination.

## 1                   CROSS-EXAMINATION

2         By Mr. Tomisser:

3         Q     Good afternoon, Mr. Wasserman. I'd like to start by asking  
4                 you about the curve you testified to. Is it correct, though,  
5                 that when you see that kind of curve, the amount of actual  
6                 production that you will get is going to be dependent on what the  
7                 quality of the habitat is above the barrier that gets corrected?

8         A     That's true.

9         Q     And the quality -- habitat quality issues is one other aspect  
10               of salmon restoration, in a general matter; is that correct?

11        A     That's true. However, quality of habitat upstream is in many  
12               cases better than the habitat downstream, habitat quality.

13        Q     But that's going to be case by case?

14        A     Certainly it will be.

15        Q     All right. When we look at issues of salmon recovery and  
16               restoration in general, do you agree with me that a comprehensive  
17               approach -- scientifically-based comprehensive approach is the  
18               best way to achieve good results on salmon recovery and  
19               restoration?

20        A     If it's a well-documented and well-implemented comprehensive  
21               approach, certainly.

22        Q     And it should be based on best available science; is that  
23               correct?

24        A     It should be based on best available science. However, there  
25               are species-specific priorities that are policy matters.

1 Q And when we look at species-specific priorities in salmon  
2 restoration, is it also true that as we look at the case area in  
3 this case, that different species have different needs in terms  
4 of improving their habitat?

5 A That's true. They have different habitat requirements.

6 Q And so -- and also in terms of areas in watersheds, there are  
7 some watershed areas where one aspect of salmon restoration,  
8 whether it's barriers, hydro, estuaries, may be different for  
9 different watersheds; is that right?

10 A Right. All watersheds are different, and there would be  
11 different variables at play.

12 Q And the lead entities who are working on those particular  
13 watersheds are charged then with developing what is the best plan  
14 for this particular watershed and the species that might use  
15 that?

16 A That's not correct.

17 Q Plans do get developed on a watershed basis for salmon  
18 restoration and recovery; is that correct?

19 A Well, the only plans that I am aware of is the Chinook  
20 recovery plans for listed species. In the Skagit, for example,  
21 there's no Coho plan or Steelhead plan or Sockeye plan. So when  
22 you say watersheds get developed for different species in  
23 different watersheds, I think it depends -- I'm not sure of the  
24 correct answer, because I'm only familiar that there are a  
25 limited number of comprehensive plans.

1 Q And so if we look at the Skagit Chinook plan, would that  
2 cover the Skagit and Samish Rivers?

3 A No.

4 Q Just the Skagit?

5 A Correct.

6 Q Is it correct that for Skagit Chinook, that estuary  
7 conditions are the primary limiting factor?

8 A Not necessarily true.

9 Q Is -- I'm sorry. Go ahead.

10 A The plan talks about a number of factors that need to be  
11 addressed. Two significant factors for Chinook, in the Skagit  
12 specifically, are both estuarine habitat and the lack of access  
13 to the estuary, and impacts associated with high flows, in the  
14 fact that when we have years of high flows, redds get scoured  
15 out, the eggs get scoured out.

16 Q Have you seen the Swinomish Tribe management plan?

17 A I have seen the plan. I think it was written quite some time  
18 ago. I haven't seen it since it was probably first written.

19 Q Do you recall that that plan did identify estuary recovery as  
20 the primary limiting factor, with barriers secondary?

21 A Without reading the plan again -- again, it's been, I think  
22 2004 that was written, so I can't recall. I haven't reviewed it  
23 since that time.

24 Q In looking at the -- are you familiar with the Skagit Basin  
25 three-year program?

1 A Could you please repeat the question?

2 Q Are you familiar with the Skagit Basin three-year work plan  
3 for 2008?

4 A I am generally familiar with the 2008 plan. I can't speak to  
5 each detail of the plan.

6 Q Do you recall that there are roughly 30 projects planned over  
7 that time period?

8 A Now -- I'm sorry. Is this the plan -- I couldn't attest to  
9 whether there are 30 projects there.

10 Q Does that number sound about right for a three-year plan?

11 A You know, I don't know. There's been a number of three-year  
12 plans. The three-year plans, I think, are directed directly  
13 towards Chinook. And so if that's the plan, I just don't know  
14 the number of projects. I'm also not sure of the difference  
15 between the three-year plan and the plan -- the Puget Sound  
16 Partnership's action agenda. They're two different things.  
17 Without having seen the plan in front of me, I can't really --

18 Q Okay. If I showed you a copy of the plan, do you think you'd  
19 recognize it?

20 A Probably.

21 Q Let's take a look.

22 MS. FOSTER: Your Honor, I'm going to object at this  
23 point. I believe that Counsel is using a document that  
24 apparently has not been marked or identified. And it's improper  
25 to ask the witness questions about the substance of the document

1 since it has not been admitted.

2 MR. TOMISSER: I'm trying to see if I can refresh his  
3 recollection of the plan, your Honor, by showing it to him.

4 THE COURT: The objection will be overruled. We will  
5 see if Mr. Wasserman can recognize it when it's shown to him.

6 By Mr. Tomisser:

7 Q This is the cover page of a draft of the 2008 three-year  
8 program. Does that look familiar?

9 A I have to say it looks generally familiar, but I'm not sure  
10 what version this might be. I just don't know if this was a  
11 watershed council product or a product that was written by the  
12 regional recovery office. I think it's the watershed council,  
13 but I'm not certain.

14 Q Do you recall previously telling me that estuaries for the  
15 Skagit Chinook are the biggest limiting factor?

16 MS. FOSTER: Objection, your Honor. Asked and answered.

17 THE COURT: Overruled. You may respond.

18 THE WITNESS: Counsel, your question, do I recall or  
19 remember saying that to you?

20 By Mr. Tomisser:

21 Q Let me ask you this: Is the statement true that for recovery  
22 plans for the Skagit Chinook that the estuary problem is the  
23 biggest limiting factor?

24 A Well, as I said before, it's both -- the plan really talks  
25 about two major areas: flows -- you know, storm flows; flooding

1       that impacts Chinook production, as well as the lack of estuarine  
2       habitat.

3       Q      Mr. Wasserman, do you recognize this as the title page of the  
4       article that you mentioned on your direct testimony for  
5       estimating Coho salmon and limiting factors?

6       A      Yes, I recognize it.

7       Q      In this report, isn't it correct that in terms of the  
8       watershed, that you identified the primary limiting factor as  
9       hydro morphology, not barrier culverts?

10      A      Hydro modification. I don't think we used the word "hydro  
11       morphology." Hydro modification.

12      Q      Hydro modification as the primary limiting factor?

13      A      For Coho production in this paper, yes.

14      Q      In fact, you developed a pie chart that illustrated that  
15       point; is that correct?

16      A      That's correct.

17      Q      What I am showing you on the screen now, this is from Page 10  
18       of that report, a depiction of that limiting factor's impact was  
19       hydro modification?

20      A      That's correct.

21      Q      Mr. Wasserman, in terms of Red Cabin Creek, is it your  
22       understanding that Red Cabin Creek is on schedule to be  
23       remediated next year?

24      A      I know it is on a schedule. I can't attest as to whether it  
25       is on a schedule for next year. I just don't know if it is on

1 for next year.

2 Q Are you aware that the cost of the project is roughly \$5  
3 million?

4 A No, I wasn't aware of that.

5 MS. FOSTER: Objection, your Honor. I don't believe  
6 that that's in evidence.

7 THE COURT: The objection is sustained.

8 MS. FOSTER: I'd move to strike.

9 THE COURT: It will be stricken.

10 You may ask another question.

11 MR. TOMISSEY: Nothing further, your Honor.

12 THE COURT: Any redirect for this witness?

13 MS. FOSTER: Yes, your Honor. I just have a couple of  
14 questions.

15 REDIRECT EXAMINATION

16 By Ms. Foster:

17 Q Mr. Wasserman, in the 1994 paper that you wrote with regard  
18 to the factors that limited Coho production in the Skagit, you've  
19 testified that hydro modification is -- was the primary factor  
20 and that culverts, blocking culverts, was the next largest factor  
21 limiting Coho production.

22 Can you please tell us the success that the tribe or Skagit  
23 River Systems Cooperative has had in addressing the hydro  
24 modification issues in the Skagit Basin, please?

25 A Sure. These issues have been quite difficult to address, in

1 that hydro modification is the diking along the river that  
2 prevents flooding of the adjacent farm lands and the cities. And  
3 in building those dikes, those off-channel areas that  
4 historically were important to salmon have been blocked off. And  
5 the ability to remove those dikes and still deal with public  
6 safety and ongoing farming has been very, very problematic.

7 And so it's been very hard to try to deal with the hydro  
8 modification issues. We've been able to do it in a few places,  
9 but the magnitude of the problem and the resistance to make those  
10 kind of changes has resulted in only limited successes.

11 MS. FOSTER: Thank you. I have no further questions at  
12 this time.

13 | THE COURT: You may step down. Thank you.

14 Can we have the plaintiffs' next witness, please.

15 MS. FOSTER: I would call Mike McHenry to the stand,  
16 please.

17 Whereupon,

18 | MICHAEL McHENRY

19       Called as a witness, having been first duly sworn, was examined  
20       and testified as follows:

21 THE CLERK: Please state your name for the record and  
22 spell your last name.

23 THE WITNESS: My name is Michael McHenry, M-I-C-H-A-E-L,  
24 capital M, small C, capital H-E-N-R-Y.

THE COURT: You may inquire.

1 MS. FOSTER: Thank you, your Honor.

2 DIRECT EXAMINATION

3 By Ms. Foster:

4 Q Mr. McHenry, are you currently employed?

5 A Yes, I am.

6 Q And where are you employed?

7 A I am employed at the Lower Elwha Klallam Tribe.

8 Q What is your position at the Lower Elwha Klallam Tribe?

9 A I am the fisheries habitat manager for the tribe.

10 Q And for how long have you held that position?

11 A I have been employed with the tribe since 1991.

12 Q And what are your responsibilities in that position?

13 A I report directly to the fisheries manager. I manage the  
14 habitat portions of the tribe's usual and accustomed areas; that  
15 is the watersheds that the tribe relies on for its fish and  
16 shellfish and wildlife resources.

17 I manage a program that involves habitat protection of those  
18 resources, assessment -- that is, assessment of their condition,  
19 restoration.

20 Q And do you conduct any fieldwork?

21 A I conduct a lot of fieldwork.

22 Q And would you please advise the Court of your educational  
23 background, please?

24 A Yes. I have a Bachelor of Science degree from Humboldt State  
25 University in fisheries and a Master's of Science from New Mexico

1 State University in wildlife science.

2 Q Are the honors that you have received and the publications  
3 that you have written listed in your resume?

4 A Yes, they are.

5 MS. FOSTER: Madam Clerk, would you please show the  
6 witness Exhibit AT-004-1, please.

7 By Ms. Foster:

8 Q Mr. McHenry, showing you what has been marked as AT-004-1, is  
9 that your resume?

10 A Yes, it is.

11 MS. FOSTER: Your Honor, I would move to admit AT-004-1  
12 at this time.

13 THE COURT: I believe it's already in evidence, Counsel.

14 MS. FOSTER: Thank you.

15 By Ms. Foster:

16 Q Mr. McHenry, could you please advise the Court as to the  
17 number of years that you have spent in salmon biology and habitat  
18 restoration?

19 A 25 years.

20 Q Are you familiar with the relevant literature in salmon  
21 ecology and watershed restoration?

22 A Yes, I am.

23 Q Did you prepare a Declaration in Lieu of Direct Testimony for  
24 this sub-proceeding in U.S. v. Washington?

25 A Yes, I did.

1 Q If you would, please, turn to AT-004 in the book that the  
2 clerk has just handed you.

3 Is that your declaration?

4 A Yes, it is.

5 Q And would you turn, please, to the -- would you please tell  
6 us whether or not that's your signature on the declaration?

7 A Yes, that's my signature.

8 Q And what is the date of that declaration?

9 A The 10th day of October, 2009.

10 Q Was there a report attached to your declaration?

11 A Yes, there is.

12 Q And did you prepare that report for this sub-proceeding?

13 A Yes, I did.

14 Q When did you initially prepare that report?

15 A March 27th, 2009.

16 Q And have you subsequently amended the report?

17 A Amended October 10, 2009.

18 Q And is the report that is attached to your declaration the  
19 amended report?

20 A Yes, it is.

21 Q And are there any exhibits attached to that report?

22 A There are exhibits.

23 Q Were those exhibits attached to your initial report?

24 A Yes.

25 Q Do you adopt the Declaration of Mike McHenry regarding

1       Prefiled Written Direct Testimony dated October 10, 2009, in the  
2 report, and exhibits attached thereto as your direct testimony  
3 today?

4       A     I do.

5       Q     If you could you please turn your attention to AT-004-7.

6       A     Okay.

7       Q     Could you please tell us what this photograph purports to  
8 represent?

9       A     This is a photograph of a box culvert under Highway 101 that  
10 drains Chicken Coop Creek.

11      Q     And are you familiar with that particular culvert?

12      A     Yes, I am.

13      Q     And did you take that photograph?

14      A     I did not take this particular photograph.

15      Q     And who took that photograph?

16      A     The photograph was taken by Byron Rote.

17      Q     And who is Mr. Rote?

18      A     He is the habitat manager for the Jamestown S'Klallam Tribe.

19      Q     Do you know approximately when that photograph was taken?

20      A     I believe it was the summer of 2006.

21      Q     And does that photo -- does AT-004-7 accurately represent the  
22 state-owned barrier culvert on Chicken Coop Creek?

23      A     I was there a couple of weeks ago. It has not changed.

24                          MS. FOSTER: Your Honor, I would move to admit AT-004  
25 and AT-004-2 through AT-004-11 at this time.

1                   MR. SHAFTEL: Your Honor, the State only has an  
2 objection to, I believe, to one exhibit, and that would be -- I'm  
3 sorry, I guess you haven't offered that. I will wait.

4                   THE COURT: No objection to those exhibits she just  
5 requested?

6                   MR. SHAFTEL: No objections, your Honor.

7                   THE COURT: Those will be admitted.

8 I'm sorry. Ms. Foster, can you go through that with me  
9 again?

10                  MS. FOSTER: I would be happy to, your Honor. That  
11 would be AT-004 and then AT-004-02 through 004-11.

12                  THE CLERK: Through 11?

13                  MS. FOSTER: Through 11.

14                  MR. SHAFTEL: I'm sorry. I misspoke. I do have one  
15 outstanding objection on the declaration, if I may. On the last  
16 page, there's a reference to a data set. And the implications of  
17 the data set is to increase smolt production. I believe that the  
18 data set is not the type of data upon which experts should be  
19 relying, under Federal Rules of Evidence 702.

20                  THE COURT: Tell me again what page that was.

21                  MR. SHAFTEL: It will be on the very last page. I  
22 believe it's Page 12 to 13 of the declaration. He makes  
23 reference to the data set. The reason for my confusion is  
24 because the actual chart has not been offered into evidence yet.  
25 The chart is Figure 12, AT-004-13.

1           In his deposition, Mr. McHenry testified that it was too  
2 early to tell what this data meant.

3           THE COURT: All right. All of the other exhibits will  
4 be admitted. We'll reserve on that portion of it, Ms. Foster,  
5 until you get some questions and answers going through it with  
6 Mr. McHenry.

7           Do you understand the objection being made by the State about  
8 that?

9           MS. FOSTER: Yes, I do, your Honor.

10          THE COURT: All right. Thank you.

11          MS. FOSTER: I will get to that later.

12          By Ms. Foster:

13          Q       Mr. McHenry, generally speaking, what is the current status  
14         of wild salmon species in the watershed native to the Olympic  
15         Peninsula?

16          A       The Olympic Peninsula contains a variety of watersheds -  
17         large, small, medium, glacier fed, rainfall fed - that support  
18         many different stocks. In general, on the north Olympic  
19         Peninsula, the status of salmon is depressed. There are at least  
20         33 stocks that are in a depressed state. There are several that  
21         are listed under the Endangered Species Act.

22          As you move to the outer coast, the situation is a little  
23         better. There are healthier situations there, but there are some  
24         that are not meeting their escapement goals.

25          Q       What has been the effect of the decline on the fisheries at

1       the Lower Elwha Tribe?

2       A     The tribe has greatly reduced its fishing effort over the  
3           past two to three decades. And in fact, in watersheds that it  
4           historically fished along the Strait of Juan de Fuca, it no  
5           longer fishes many of them. It voluntarily ceased fishing as  
6           part of a conservation closure in the mid-1980s. So places like  
7           the Pysht and the Hoko River no longer have salmon fisheries in  
8           them.

9       Q     Does the tribe harvest any hatchery stocks?

10      A     Yes. The tribe's terminal salmon fisheries have switched  
11           primarily to hatchery-produced stocks in a couple of rivers, the  
12           Elwha and Dungeness mainly.

13      Q     As a result of these changes in stocks of salmon and the  
14           impacts to the tribe's fisheries, has the tribe formulated a  
15           particular approach to habitat protection and restoration?

16      A     Yes. We're trying to recover our salmon populations at the  
17           watershed scale, and we use a hierarchical approach that involves  
18           protecting first best available habitats for salmon.

19           Second, correcting artificial barriers, be they culverts from  
20           roads or dikes or other sorts of structures that affect access to  
21           habitat. And then we get into restoring the processes of formed  
22           habitat in the watershed, so the flow of wood, sediment, and  
23           water.

24           And then finally we have a monitoring component so that we  
25           can learn from what we're doing and adapt our programs

1 accordingly.

2 Q Do you have an opinion as to whether or not that particular  
3 approach is scientifically based?

4 A Yes. It's been published in the scientific literature, that  
5 particular approach.

6 Q And have you cited those studies in your report?

7 A I have.

8 Q And is this approach unique to the Lower Klallam Tribe or is  
9 it used by others, to your knowledge?

10 A I think it is being used more frequently in other places, but  
11 it is hard for me to say how widely it is being applied.

12 Q Have you conducted watershed assessments for any portions of  
13 the Olympic Peninsula?

14 A Yes, we have.

15 Q And would you please describe for the Court what you mean by  
16 a watershed assessment?

17 A Yes. A watershed assessment is -- I look at it as a toolbox  
18 that we apply on our watersheds. It's a series of analyses that  
19 we do to actually quantify how the watersheds have changed from  
20 their historic condition. And we use that data to then plan and  
21 prioritize our restoration efforts.

22 Q Are you familiar with the limiting factors analyses that have  
23 been prepared by the state of Washington?

24 A I am. I participated in the WRIA 18 and WRIA 19 Elwha phase.

25 Q When you say "WRIA," what does WRIA refer to?

1 A WRIA is a planning unit the State has. It is a Watershed  
2 Resource Inventory Area. And it includes, in the case of where I  
3 work, multiple watersheds. So it is a much broader planning  
4 scale of watershed assessment which occurs at a true watershed  
5 scale.

6 Q Other than the scale of the -- a difference in scale between  
7 a watershed assessment and a limiting factors analysis, is there  
8 any other difference between the two analyses?

9 A Yeah. In my opinion, there are huge differences. The  
10 watershed assessment technique is a much finer instrument than  
11 the LFA. The limiting factors analyses that I have participated  
12 in were done under pretty rushed timelines with very busy people,  
13 coming into a room and sitting around the table and kind of  
14 taking their best crack as to what they thought the limiting  
15 factors were.

16 The watershed assessment is much different, and you actually  
17 have time to go out in the field to get the photos you need to do  
18 the analysis, to get out, to find the barriers, to do your  
19 historic reconstruction of the fish populations. It is a much,  
20 much more quantitative tool.

21 Q So generally speaking, what information does a watershed  
22 assessment provide that a limiting factors analysis does not  
23 provide?

24 A Well, depending on your objective, it can produce a lot of  
25 things. It has been used in forest practices to modify forest

1 practice regulations. We use it for restoration planning, to  
2 prioritize and identify projects. You can use it to figure out  
3 your landslide rates on the landscape, condition your riparian  
4 zones, how hydrology has changed.

5 Q Can you provide us with any examples of a watershed  
6 assessment that provided an additional quantitative analysis?

7 A Yes. We have done watershed assessments on two watersheds of  
8 note. One is Salt Creek, an independent tributary to the Strait  
9 of Juan de Fuca. And in that assessment, one of the first things  
10 that we found was that the stream layer was wrong. The data  
11 layer that people use to manage the streams was wrong.

12 We corrected the stream layer using a watershed assessment,  
13 some new remote sensing techniques, and we doubled the amount of  
14 water that we found in that watershed. It went from 25 miles to  
15 50 miles of habitat. And on that habitat, we also found many  
16 more barriers than anyone ever knew existed. And these are  
17 culvert barriers. We found a total of 31 culvert barriers in  
18 this watershed. That was not known from the LFA.

19 Q As a result of your assessment in watershed -- watershed  
20 assessment in Salt Creek, did you make any recommendations to the  
21 Lower Elwha Klallam Tribe regarding habitat restoration and  
22 protection?

23 A Yes. Salt Creek, because of the amount of low gradient  
24 stream habitat it has in it, it has a high potential for Coho  
25 salmon production. And we recommended and have begun to

1       implement a systematic barrier correction program in the  
2       watershed. The tribe has taken the lead on that. And as of this  
3       summer, we have corrected 17 of those barriers.

4       Q     And how many barriers total did you find?

5       A     31.

6       Q     And were some of those barriers that you corrected  
7       state-owned barriers?

8       A     Yes. They were on state, county, and private lands.

9       Q     The ones that were on state lands, why did you fix those  
10      barrier culverts?

11      A     Well, we weren't able to fix any DOT-owned barriers. We  
12      focused on DNR lands. These are forest lands and logging roads.  
13      And this particular block of land had quite a bit of road length  
14      in it that was going to be abandoned, or needed to be abandoned.  
15      And so we had a combination of culvert replacements, actual  
16      culvert removals and culvert for -- bridge replacements. We  
17      chose to do those to accelerate the recovery of salmon in that  
18      watershed. We did not want to wait for the forest and fish  
19      deadline.

20      Q     And for completing the -- I believe you testified you also  
21      completed a watershed assessment on the Pysht River; is that  
22      correct?

23      A     Yes.

24      Q     After completing that watershed assessment, what information  
25      did you learn that was different from the limiting factors

1 analysis that included the same area?

2 A Again, we found a lot of stream habitats that were unknown  
3 and unmapped and not on any water type map. On those habitats,  
4 we found blocking culverts on various ownerships, and we found  
5 that those culverts blocked about eight miles of the total  
6 floodplain habitat in that analysis. We were looking  
7 specifically at the Pysht River floodplain and its associated  
8 habitats.

9 Q And how many miles actually was covered by that particular  
10 analysis?

11 A We covered the lower ten miles of the river and all its  
12 floodplain.

13 Q Are you saying that eight of the ten miles was what was  
14 blocked?

15 A Well, there's ten linear miles of the lower river. When you  
16 add all the little wetlands and sinuous channels, there was eight  
17 miles of habitat blocked that drained into the river. About  
18 half.

19 Q Half of what?

20 A Half of the historically accessible habitat.

21 Q As a result of that assessment, did you again make  
22 recommendations to the Lower Elwha Klallam Tribe?

23 A Yes. We looked at a number of restoration options in the  
24 Pysht. Barrier correction is one of them that is high on the  
25 list, but we are also looking at large-scale projects in the

1 mainstem of the river and in the estuary.

2 Q And has the Lower Elwha Klallam Tribe acted upon your  
3 recommendations?

4 A We have. We have corrected one barrier in 2007, and we have  
5 another barrier/culvert scheduled for correction next summer.

6 Q In addition to the barrier corrections in the Salt and the  
7 Pysht watersheds, has the tribe corrected blocking culverts in  
8 other watersheds?

9 A We have.

10 Q And what watersheds are they?

11 A The Hoko, Deep Creek, East Twin River, Lyre River, Whiskey  
12 Creek.

13 Q Has the Lower Elwha Tribe monitored any sites where culverts  
14 have been corrected and habitat opened up to fish passage?

15 A We have done some monitoring at some sites.

16 Q Would you please explain to the Court the nature of your  
17 monitoring?

18 A Yeah. It is fairly simple. When we do culvert monitoring,  
19 we're really looking at who gets there fish-wise; who's there  
20 before the culvert is removed and who gets there afterwards.

21 So we use a combination of either adult surveys, which are  
22 typically done on foot, or we walk up the channel and count and  
23 identify fish, or we'll actually go in and collect juvenile fish.  
24 And we use electrofishing or smolt trapping for those  
25 enumerations.

1 Q When conducting the monitoring that you have, does the tribe  
2 follow established scientific methods?

3 A We do.

4 Q And what has your monitoring shown, if anything?

5 A Well, I have qualitative results that include standing at a  
6 culvert site the first storm after it was removed and seeing Coho  
7 salmon pass. And I also have fish presence data that show  
8 juvenile, Coho usually, in these sites that we've been  
9 monitoring, accessing above. And we also have some smolt  
10 trapping data from one site in particular on the south fork of  
11 the Pysht River.

12 Q If I could show you AT-004-13.

13 A Yes.

14 Q Who prepared this chart?

15 A I did.

16 Q And was this -- when did you prepare this chart?

17 A This is the site on the south fork of the Pysht where we do  
18 smolt trapping. And I update this graph every year. I think the  
19 first year I prepared this was 2005. Basically we're monitoring  
20 the site to see how the tributary responds to the opening of  
21 barriers and other restoration in terms of how many smolts it  
22 produces.

23 And this data is a compilation of that data we have collected  
24 every year, basically the number of Coho smolts out of the  
25 tributary system.

1 Q Was this chart prepared for litigation?

2 A No. It was routine monitoring.

3 Q Was it, then, prepared at or near the time when you obtained  
4 the monitoring data shown in the chart?

5 A Yes.

6 Q And was it prepared in the regular course of the tribe's  
7 monitoring study?

8 A Yes.

9 Q Was it your regular practice to prepare such a chart?

10 A Yes. As I said, we are trying to monitor our restoration  
11 efforts. This is part of that effort.

12 MS. FOSTER: Your Honor, I would move for the admission  
13 of AT-004-13 as a business record -- excuse me, as the business  
14 record exception to the hearsay rule under Federal Rule 803(6).

15 THE COURT: Any objections, Counsel?

16 MR. SHAFTEL: Yes, your Honor, on relevance under ER  
17 702 -- I'm sorry, Federal Rule of Evidence 702. Just the data is  
18 insufficient to make any sort of expert opinion on it, and  
19 therefore it's also irrelevant in this case based upon its  
20 limited information.

21 THE COURT: All right. Thank you. Those objections  
22 will be overruled. 004-13 will be admitted. There was no data  
23 for 2001?

24 THE WITNESS: We had some funding issues that year. We  
25 don't get paid to monitor. We have to come up with funds for our

1 monitoring mostly.

2 MS. FOSTER: Your Honor, I neglected to offer AT-004-12,  
3 which is --

4 THE COURT: That's already admitted, Counsel.

5 MS. FOSTER: Thank you. I have no further questions at  
6 this time.

7 THE COURT: Cross-examination, Mr. Shaftel.

8 CROSS-EXAMINATION

9 By Mr. Shaftel:

10 Q Good afternoon, Mr. McHenry.

11 A How are you?

12 Q You had the good fortune of being deposed not once but twice  
13 in this case; is that right?

14 A That's correct.

15 Q Once in 2006, by Mr. Steve Dietrich, and then again by myself  
16 in 2009; is that right?

17 A Yes.

18 Q Mr. McHenry, you are familiar generally with the habitat in  
19 WRIA 18 and 19, which are generally associated with the usual and  
20 accustomed fishing places of the LEKT; is that correct?

21 A Yes, that's correct.

22 Q Outside of those two WRRIAs, you don't have any personal  
23 knowledge of habitat conditions; is that correct?

24 A That would be incorrect. I worked in WRIA 20 for two years,  
25 so I have direct knowledge of WRIA 20 as well.

1 Q Any other WRIsAs other than those three?

2 A WRIA 17 as well. I've done a little work in WRIA 17.

3 Q Any other than those four?

4 A No.

5 Q And you've also -- the studies that you mentioned, those were  
6 in WRIsAs 19, is that correct, the two watershed assessments that  
7 you performed?

8 A There were others, but, yes, the two I mentioned were in 19.

9 Q And have you performed any outside of 18 and 19?

10 A Yes. I was involved with a whole watershed analysis, which  
11 is in WRIA 20.

12 Q Any others?

13 A No.

14 Q And the testimony that you provided in your declaration, is  
15 that purely limited to those WRIsAs with which you're familiar?

16 A Could you rephrase the question?

17 Q You make a lot of representations about conditions of  
18 habitat, and I'm wondering whether or not that is limited to  
19 WRIsAs 18, 19. Is that correct?

20 A I think if I understand your question, that's correct. But I  
21 also used other literature to reach some of my conclusions.

22 Q And those conclusions were based upon your experiences in  
23 WRIsAs 18 and 19?

24 A Yes.

25 Q You mentioned in your deposition in 2006 -- I don't know if

1       you recall this, and tell me if you don't, but you were shown a  
2       stock status report from 1996 by Steve Dietrich.

3           Do you remember that?

4       A     Yes.

5       Q     And he asked you some questions about the condition of stocks  
6       with which the LEKT generally harvest, and he asked you whether  
7       or not -- what those changes had been between 1996 and 2006.

8       A     Um-hum.

9       Q     Do you remember that line of questioning?

10      A     I do, yes.

11      Q     And he asked you about the Strait of Juan de Fuca Chum being  
12       down. I guess he asked you what species you remember being down,  
13       and one of the species you remembered was the Strait of  
14       Juan de Fuca Chum --

15           MS. FOSTER: Your Honor, I'm going to object. I believe  
16       that the witness has not yet -- if Mr. Shaftel is trying to  
17       impeach the witness, I don't believe he's laying the proper  
18       foundation.

19           THE COURT: The objection is overruled. I don't know  
20       what the question is going to be yet.

21           Mr. Shaftel, go ahead.

22           MR. SHAFTEL: Thank you.

23           By Mr. Shaftel:

24       Q     The question is whether or not you remember the line of  
25       questioning about the Strait of Juan de Fuca Chum being down

1           between the years 1996 and 2006.

2           Do you remember being asked about that?

3       A    I believe I do.

4       Q    In fact, what you said at that time was that the Strait of  
5           Juan de Fuca Chum was down because of degradation of mainstem  
6           habitat; is that right?

7       A    I did say that, yes.

8       Q    Is that still your testimony?

9       A    Yes.

10      Q    And mainstem habitat issues are unrelated to state barrier  
11           culverts; isn't that correct?

12      A    Mostly, yes.

13      Q    And are you also familiar with the lifecycles of Pink salmon?

14      A    Yes. I'm quite aware of their life history.

15      Q    Okay. And are they also mainstem spawners, similar to Chum?

16      A    We don't have populations of Pink Salmon in the Strait of  
17           Juan de Fuca, except for the Elwha and Dungeness River.

18      Q    Is that consistent with your understanding, that Pinks are  
19           mainstem spawners?

20      A    Mainstem and large tributary.

21      Q    By and large, Pinks, in fact, are a species that are less  
22           impacted by barrier culverts than Coho; is that correct?

23      A    In my watersheds that I work in, yes, I would say that's  
24           probably true.

25      Q    Is that also consistent with your understanding outside of

1       your watersheds?

2       A     I don't know. That is an honest answer.

3       Q     And those are the ones I'm looking for.

4           Steve Dietrich also asked you some questions about the  
5           condition of Coho between 1996 and 2006, and you said that Coho  
6           were slightly up during that period? Do you remember that?

7       A     Yes, I do.

8       Q     Is that still consistent with your understanding?

9       A     No. They have since declined. We had a little blip of high  
10      survival around 2000, 2001, but they have since declined again.

11      Q     So there have been fluctuations of Coho?

12      A     Yes. However, last year was the lowest return ever in the  
13      Strait of Juan de Fuca.

14      Q     You said between 1996 and 2006, Chinooks had flatlined; is  
15      that correct?

16      A     I was referring to the Hoko River stock, which is sort of a  
17      depressed flatline life-support state.

18      Q     Would you agree -- I'm sorry. I will start over.

19           Harvest reform is an important step in establishing salmon  
20      recovery; isn't that correct?

21      A     If has been an important step, and the co-managers have  
22      committed to it.

23      Q     In fact, there was overharvest by all groups occurring in the  
24      late 1880s -- sorry, 1980s?

25      A     I'm not a harvest manager. I don't know.

1 Q Isn't that what you testified to in your deposition this last  
2 summer?

3 A There were high rates of harvest, but that would be a better  
4 question for a harvest manager.

5 Q And those high rates of harvest had occurred in the late  
6 1980s; is that right?

7 A My understanding is that our rates of harvest were very high  
8 on some stocks in the 1980s and early 1990s.

9 Q And that was true for both the tribes and the non-tribal  
10 fishermen?

11 A Again, that would be a better question for the harvest  
12 managers. My understanding of a lot of Washington coastal stocks  
13 is they were heavily impacted by Alaska and British Columbia  
14 fisheries, actually.

15 Q I am just asking for your understanding. I will move on.

16 There has been a lot of progress made in reducing overharvest  
17 in the last 15 years; is that right?

18 A I believe so.

19 Q But there is still some overharvest occurring today; is that  
20 correct?

21 A There could be on some stocks.

22 Q And that's indeed your opinion; isn't that true?

23 A There could be on some stocks, yes.

24 Q Another aspect of salmon recovery that is very important is  
25 hatchery reform?

1 A (Witness nodding in the affirmative.)

2 Q Could you verbalize your answers, please?

3 A Yes, hatchery reform.

4 Q And hatchery reform is in fact caused -- I'm sorry, prior to  
5 some of the hatchery reform occurring, the problems with  
6 hatcheries have caused degradation of certain stocks; is that  
7 correct?

8 A Well, hatcheries have caused a number of problems. One is  
9 that they've supported artificially high fisheries, which led to  
10 some of our overharvesting rates. They've also caused problems  
11 with dilution of genetics, swamping of native gene sources from  
12 different watersheds, reducing survival of those wild fish.

13 Q So it's very important in order to address salmon recovery to  
14 address the hatchery reform issue?

15 A Yes.

16 Q And that's a very expensive proposition, in your experience;  
17 is that correct?

18 A Did you say "expensive" or "inexpensive"?

19 Q I'm sorry. Expensive to perform hatchery reform?

20 A I think in some cases there's substantial savings, because  
21 you're talking about reducing the number of hatchery fish that  
22 you're growing and the costs associated with growing them, so I  
23 don't necessarily agree with that.

24 Q But you do agree that it's important to continue efforts on  
25 hatchery reform?

1 A Yes.

2 Q And hydropower is actually a pretty big deal to the LEKT.

3 And I apologize for using the acronym. Just for expediency, if I  
4 may.

5 A I know what you mean.

6 Q Okay. Should I ask the question again?

7 Hydropower is a very important issue to the LEKT due to the  
8 fact that there's two dams on the Elwha River that block fish  
9 passage?

10 A That's correct.

11 Q And in fact, habitat -- the habitat component of salmon  
12 recovery includes a lot of different aspects, including things  
13 like logging, water diversions, urban development, floodplain  
14 connectivity, channel conditions, water quality, hydrology,  
15 nutrient levels, sedimentation, and riparian conditions.

16 Would you agree with that?

17 A Yes. There's a lot of complexity to restoring salmon  
18 populations, and you've touched on many of those.

19 Q And in fact, there are -- in fact, while there are barriers  
20 in the U&A, many of those barriers -- I'm sorry, in the usual and  
21 accustomed fishing places of the LEKT, many of those barriers are  
22 in fact owned by non-state entities; is that correct?

23 A That's correct.

24 Q They're owned by private individuals or logging companies,  
25 cities, counties, and the U.S. Forest Service; is that correct?

1 A To name a few.

2 Q Now, you talked a little bit about limiting factors analysis  
3 in your direct testimony. I don't know that it was ever  
4 explained what a limiting factor analysis is.

5 In case it is not self-evident, would you agree that limiting  
6 factors analyses are studies that examine the sources of  
7 mortality that affect fish populations?

8 A Yeah. It is a synopsis of people's opinions and available  
9 information.

10 Q And the limiting factors analyses that you participated in  
11 were performed in 1990 and 2000; is that correct?

12 A Yes.

13 Q And those limiting factors analyses were performed by getting  
14 a large -- a wide array of different interest groups together to  
15 talk about all the different impacts they believed were happening  
16 in these watersheds; is that correct?

17 A Yes, that's correct.

18 Q And the tribes were -- the LEKT were involved?

19 A Yes. I participated in those processes.

20 Q As well as other local groups?

21 A Yeah. The Department of Fish and Wildlife, DNR folks,  
22 others.

23 Q Any county folks or city folks?

24 A Yeah, I believe county. There was county staff.

25 Q And most of these people were scientists?

1 A Yes.

2 Q Experts in their field?

3 A Yes.

4 Q The limiting factors analysis for WRIA 18 was drafted by a  
5 WDFW employee named Donald Herring.

6 Does that ring a bell?

7 A Yes. I know Don well.

8 Q In fact, you respect his opinion?

9 A I do.

10 Q According to that limiting factors analysis, in many of the  
11 watersheds in WRIA 18, barrier culverts are not in fact a  
12 limiting factor; is that correct?

13 A That is correct.

14 Q In fact, for the vast majority of them, the barrier culvert  
15 component of the habitat was described as either in good or fair  
16 condition; is that correct?

17 A Could you repeat that?

18 Q Sure. Do you recall that there was an effort made to  
19 describe the different components of the habitat in each  
20 watershed?

21 A Yes.

22 Q And for each component, there was a descriptor given to it,  
23 whether it be fair, good or poor?

24 A Yes. Yes.

25 Q And do you remember that, in fact, the majority of the

1 watersheds in WRIA 18, barrier culverts, or I guess it was  
2 described as access, were in fair or good condition; is that  
3 correct?

4 A I don't actually remember that. It's been ten years since  
5 I've participated in that.

6 Q Sure. Would it help if I were to show you the document?

7 | A Sure.

8           MR. SHAFTEL: Your Honor, I'm about halfway through. I  
9 don't know what your ending time was today.

10 THE COURT: You're about halfway through?

11 MR. SHAFTEL: Yeah.

12 THE COURT: Let's go ahead and recess until tomorrow.  
13 We'll start tomorrow morning.

14 MR. SHAFTEL: Sounds good.

15 THE COURT: All right, Mr. McHenry. We'll see you back  
16 here tomorrow morning at nine o'clock.

17 | (Adjourned for the day.)

## **CERTIFICATE**

I, Barry L. Fanning, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

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**Barry L. Fanning**